

FEB 10 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants.

-v-

ONEY ELLIOTT, ET AL., AS THE SHAREHOLDERS'
TECTIVE COMMITTEE OF LONG BEACH FEDERAL
INGS AND LOAN ASSOCIATION AND LONG BEACH
ERAL SAVINGS AND LOAN ASSOCIATION, ET AL.,
Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLEES LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION AND ELLIOTT, ET AL.,
AS THE SHAREHOLDERS' PROTECTIVE COMMITTEE OF SAID
ASSOCIATION

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TOPICAL INDEX

	<u>Page</u>
INTRODUCTION-----	1
STATEMENT-----	5
QUESTIONS-----	34
SUMMARY OF ARGUMENT-----	35
ARGUMENT-----	39
I. APPELLANTS' ILLEGAL AND ARBITRARY FOR- FEITURES AND PENALTIES AGAINST THOUSANDS OF SMALL MUTUAL SAVINGS DEPOSITORS VIOLATE ACTS OF CONGRESS-----	39
II. FEDERAL SAVINGS AND LOAN ASSOCIATIONS ARE REQUIRED BY CONGRESS TO BE "MUTUAL" ASSOCIATIONS-----	45
III. ANY UNEQUAL DISTRIBUTION AMONG MUTUAL SAVINGS DEPOSITORS PREFERRING ONE AND EXCLUDING OTHERS, VIOLATES THE ACT OF CONGRESS AND IS VOID-----	55
IV. ANY PREFERENCE OF ONE CLASS OF SAVINGS DEPOSITORS (SHAREHOLDERS) OVER ANOTHER MUST BE PLAINLY STATED IN THE PASSBOOKS GIVEN TO THE SHAREHOLDERS-----	58
V. APPELLANTS SWORE TO CONGRESS THAT ALL SAVINGS DEPOSITORS BIG AND SMALL, OLD AND NEW ARE TREATED ALIKE-----	61
VI. PLEDGING A SAVINGS ACCOUNT TO SECURE A LOAN IS NO CRIME OR WRONG. IT CANNOT BE USED AS AN EXCUSE TO FORFEIT ANY PART OF THE PLEDGED SAVINGS ACCOUNT-----	72
VI-A. APPELLANTS MADE NO FINDINGS OF ANY FRAUD, CRIME, OR WRONGDOING BY ANYONE-----	77
VII. HAVING MORE THAN \$10,000 IN A SINGLE SAVINGS ACCOUNT IS NO CRIME OR WRONG. IT CANNOT BE USED AS AN EXCUSE TO FORFEIT ANY PART OF SAID ACCOUNT-----	84

	<u>Page</u>
VIII. APPELLANT BANK BOARD FORFEITS SMALL DEPOSITORS INSTEAD OF PROTECTING THEM-----	87
IX. WHATEVER MAY BE THE POWER OF THE BOARD BASED UPON FINDINGS OF FACT IT CANNOT FORFEIT PLAINTIFF'S SAVINGS DEPOSITS BY MERE EDICT OR FIAT ISSUED AFTER THE DEPOSITS WERE MADE-----	97
X. BY THE TERMS OF APPELLEE LONG BEACH FEDERAL'S CHARTER IT COULD NOT BE AMENDED WITHOUT THE ASSOCIATION'S CONSENT-----	106
XI. THE TRIAL COURTS 1,899 JUDGMENTS ARE JUST AND EQUITABLE. THEY SHOULD BE AFFIRMED REGARDLESS OF WHETHER THIS COURT OF APPEALS APPROVES ALL THE TRIAL COURTS REASONS FOR ENTERING SUCH JUDGMENTS-----	110
XII. \$4,606,250,000 OF NEW SAVINGS DEPOSITS WERE MADE IN 108 LOS ANGELES - LONG BEACH SAVINGS ASSOCIATIONS IN 1962. NONE WERE PENALIZED EXCEPT LONG BEACH FEDERAL-----	126
XIII. APPELLEE SHAREHOLDERS' PROTECTIVE COMMITTEE PROPERLY REPRESENT ALL 60,000 LONG BEACH FEDERAL SAVINGS DEPOSITORS. THEY REFUSE TO ACCEPT ANY FORFEITED STOCK: NONE HAVE JOINED WITH APPELLANTS-----	129
XIV. THERE IS NO LACHES OR ESTOPPEL BY APPELLEES LONG BEACH FEDERAL OR ITS SHAREHOLDERS' PROTECTIVE COMMITTEE-----	146
XV. APPELLANTS RELY ON OHIO AND OTHER CASES RE STABLE AND SAFE SAVINGS ASSOCIATIONS. SUCH CASES CAN HAVE NO APPLICATION TO THE WRECKED AND DAMAGED APPELLEE LONG BEACH FEDERAL AND ITS PRECARIOUS CONDITION AFTER 20 YEARS OF SEIZURES, LITIGATION AND RUNS-----	148

XVI.	THE DISTRICT COURT HAS JURISDICTION OVER THE CALIFORNIA SAVINGS AND LOAN COM- MISSIONER TO PREVENT HIM FROM VIOLATING THE U. S. CONSTITUTION, FEDERAL STATUTES AND APPELLEE'S FEDERAL RIGHTS IN THEIR FEDERAL SAVINGS AND LOAN ASSOCIATION-----	153
	A. Suing The California Savings And Loan Commissioner Does Not Make The State Of California A Defendant-----	153
	B. The State Of California Has Con- sented To Suit Against The California Savings And Loan Commissioner-----	161
	C. The United States Court Which Holds Physical Possession Of \$9,500,000 Of Equitable Guarantee Stock Decides All Questions Concerning That Stock-----	171
	D. It Is Not Necessary To Name The California Savings And Loan Commissioner As A Personal Defendant-----	175
	E. The Commissioner's Authorities Apply Only To Actions To Recover Money Or Property From The State And Do Not Apply To Our Three Cases-----	176
	F. Appellant California Savings And Loan Commissioner Makes Claims On Appeal Contrary To His Answers To The Trial Court-----	177
XVII.	SUMMARY JUDGMENT WAS A PROPER METHOD FOR THE TRIAL COURT TO DECIDE THE CASE-----	182
	CONCLUSION-----	188

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>Page</u>
<u>Anglo-Canadian Shipping Co. Ltd. v.</u> <u>Federal Maritime Com'n., 310 F. 2d 606 (1962)</u> -----	101
<u>Boyd v. United States, 116 U.S. 616, 29 L.ed.</u> <u>746 (1886)</u> -----	116
<u>California Motor Transport Co. v.</u> <u>Public Utilities Com., 59 C. 2d 270 (1963)</u> -----	104
<u>California State Board of Equalization v.</u> <u>Goggin, 191 F. 2d 726 (CA-9, 1951) [Cert.</u> <u>Denied 342 U. S. 909, 96 L. ed. 680]</u> -----	174
<u>California State Board of Equal. v.</u> <u>Coast Radio Prod.,</u> ----- <u>228 F. 2d 520 (CA-9, 1955)</u>	174
<u>Castner v. First National Bank of Anchorage,</u> <u>278 F. 2d 376 (CA-9, 1960)</u> -----	113
<u>Chambers v. United States, 357, F. 2d 244</u> <u>(CA-8, 1966)</u> -----	186
<u>C. I. R. v. Wilshire Holding Corporation,</u> <u>288 F. 2d 799, (CA-9, 1961)</u> -----	33
<u>Coffey v. Jordan, 275 F. 2d 1 (U.S.C.A. -</u> <u>Dist. of Columbia, 1959)</u> -----	104
<u>Commissioner of Internal Revenue v. Van Vorst,</u> <u>59 F. 2d 677 (CA-9, 1932)</u> -----	39, 40, 41
<u>Denicke. et al., v. Anglo-California Nat'l.</u> <u>Bank of San Francisco, 141 F. 2d 285 (CA-9, 1944)</u> <u>[Cert. Denied 323 U. S. 739, 89 L. ed. 592]</u> -----	138
<u>Denicke v. Anglo California Nat. Bank, 45 Fed.</u> <u>Supp. 524 (1942) [Cert. Den. 323 U.S. 739, 89</u> <u>L. ed. 592]</u> -----	139
<u>Dixon v. United States, 381 U. S. 68, 14 L. ed.</u> <u>2d 223 (1965)</u> -----	41
<u>Elliott v. Federal Home Loan Bank Board,</u> <u>233 F. Supp. 578 (1964)</u> -----	2, 5, 11, 16, 17, 19, 22, 24, 25, 41, 42, 57, 63, 67, 78, 85, 89, 112, 115, 123, 142, 143, 153, 188,

<u>Ex Parte Tyler</u> , 149 U. S. 164, 37 L. ed. 689 (1893)-----	173
<u>Ex Parte Young</u> , 209 U. S. 123, 52 L. ed. 714 (1908)-----	160, 175
<u>Farmers v. United Electrical. etc.</u> , 211 F. 2d 36 (CA-DC, 1953) [Cert. Denied 347 U. S. 943, 98 L. ed. 1091]-----	71
<u>Federal Home Loan Bank Board v. Greater Delaware Valley S. & L. Ass'n.</u> , 277 F. 2d 437 (CA-3, 1960)-----	18,23,24,132,140,141
<u>Federal Home Loan Bank Board v. Long Beach Federal Sav. & Loan Assn.</u> , 295 F. 2d 403, (CA-9, 1961)-----	27,44,69
<u>Federal Maritime Com'n. v. Anglo-Canadian Shipping Co.</u> , 335 F. 2d 255, (CA-9, 1964)-----	39
<u>First National Bank in Billings v. First Bank Stock Corp.</u> , 306 F. 2d (CA-9, 1962)-----	183
<u>Freeman v. Bee Machine Co.</u> , 319 U. S. 448, 87 L. ed. 1509, (U. S. Supreme Court, 1942)-----	165
<u>Griffin v. School Bd. of Prince Edward</u> , 377 U. S. 218, 12 L. ed. 256 (1964)-----	155
<u>Harris v. Palm Springs Alpine Estates, Inc.</u> , 329 F. 2d 909 (CA-9, 1964)-----	131,142
<u>Hawke v. Commissioner of Internal Revenue</u> , 109 F. 2d 946 (CA-9, 1940)-----	39,40
<u>Helvering v. Sabine Transp. Co.</u> , 318 U. S. 306, 87 L. ed. 773, (1943)-----	41,42
<u>Hoston v. J. R. Watkins Company</u> , 300 F. 2d 869 (CA-9, 1962)-----	186
<u>Huntington v. Nat. Savings Bank</u> , 96 U. S. 388, 24 L. ed. 777 (1878)-----	49
<u>In Re Cleveland Savings Society</u> , 25 Ohio Op. 2d 402, 192 N. E. 2d 518 (C.P. Cuyahoga County, 1961)-----	148

	<u>Page</u>
<u>In Re Springfield Savings Society,</u> Case No. 60513, Court of Common Pleas of Clark County, Ohio (1965)-----	148
<u>In re Woodmar Realty Company,</u> 294 F. 2d 785 (CA-7, 1961), [Cert. Denied 369 U. S. 803, 7 L. ed. 2d 550]-----	11
<u>Intermountain Building & Loan Ass'n. v.</u> <u>Gallegos,</u> 78 F. 2d 972 (CA-9, 1935) [Cert. Denied 80 L. ed. 454, 296 U. S. 639]-----	51
<u>Interstate Commerce Com. v.</u> <u>Louisville & N.R.Co.,</u> 227 U. S. 88, 57 L. ed. 431 (1913)-----	105
<u>Johnson v. Lankford,</u> 245 U. S. 541, 62 L. ed. 460 (1918)-----	154
<u>Joint Anti-Fascist Refugee Com. v. McGrath,</u> 341 U. S. 123, 95 L. ed. 817 (1951)-----	189
<u>Kanatser v. Chrysler Corp.,</u> 199 F. 2d 610 (CA-10, 1952) [Cert. Denied 344 U. S. 921, 97 L. ed. 710]-----	114
<u>Kirk v. United States,</u> 270 F. 2d 110 (CA-9, 1959)-----	39,40
<u>Land v. Dollar,</u> 330 U. S. 731, 91 L. ed. 1209 (1947)--	160,175
<u>Long Beach Federal v. Federal Home Loan Bank Board,</u> 189 F. Supp. 589 (1961)-----	12,23,26,27,68,94
<u>Madisonville Traction Co. v. St. Bernard Min. Co.,</u> 196 U. S. 239, 49 L. ed. 462 (U. S. Supreme Court, 1905)-----	164
<u>Mallonee v. Fahey,</u> 14 F.R.D. 273 (1949)-----	12,21,22, 23,24,93,94
<u>McNeill v. Southern R. Co.,</u> 202 U. S. 543, 50 L. ed. 1142 (1905)-----	156
<u>Ochoa v. Hernandez Y Morales,</u> 230 U. S. 139, 57 L. ed. 1427 (1913)-----	190
<u>Pacific Coast Sav. Soc. v. Sturdevant,</u> 165 Cal. 687, (1913)-----	53

	<u>Page</u>
<u>Pan American Petroleum & Transp. Co. v.</u> <u>United States</u> , 273 U. S. 456, 71 L. ed. 734 (1927)-----	11
<u>Paramount Pest Control Service v.</u> <u>United States</u> , 304 F. 2d 115 (CA-9, 1962)-----	186
<u>Parden v. Terminal R. of Alabama Docks Dept.</u> , 377 U. S. 184, 12 L. ed. 2d 233 (1964)-----	167
<u>Porter v. Aetna Cas. & S. Co.</u> , 370 U. S. 159, 8 L. ed. 2d 407 (1962)-----	47
<u>Reagan v. Farmers Loan & Trust Co.</u> , 154 U. S. 362, 38 L. ed. 1014 (1894)-----	157, 161, 169
<u>Reich v. Webb</u> , 336 F. 2d 153 (CA-9, 1964) [Cert. Denied 380 U. S. 915; 13 L. ed. 2d 800]-----	18, 23, 132
<u>Reynolds v. United States</u> , 286 F. 2d 433 (CA-9, 1960)-----	39, 40
<u>J. E. Riley Invest. Co. v. Commissioner of</u> <u>Int. Rev.</u> , 311 U. S. 55, 85 L. ed. 36 (U. S. Supreme Court, 1940) -----	114
<u>Securities and Exchange Com. v. Chenery Corp.</u> , 87 L. ed. 626, 318 U. S. 80 (U. S. Supreme Court, 1942)-----	99, 105
<u>Securities and Exchange Com. v. Chenery Corp.</u> , 91 L. ed. 1995, 332 U. S. 194 (1947)-----	100
<u>Service v. Dulles</u> , 354 U. S. 363, 1 L. ed. 1403, (1957)-----	59
<u>Society for Sav. vs. Bowers</u> , and companion case of <u>First Federal Savings and Loan Association of Warren vs.</u> <u>Bowers</u> 99 L. ed. 950, 349 U. S. 143 (1954)-----	46
<u>State of New York v. United States of America</u> , 96 L. ed. 662, 342 U. S. 882 (U. S. Supreme Court, 1951)-----	103
<u>Sterling v. Constantin</u> , 287 U. S. 378, 77 L. ed. 375 (1932)-----	158
<u>Texas & P. R. Co. v. Humble</u> , 181 U. S. 57, 45 L. ed. 747, (U. S. Supreme Court, 1901)-----	164

<u>The Trustees of Dartmouth College v.</u> <u>Woodward</u> , 17 U. S. 518, 4 L. ed. 629 (1819)-----	106
<u>United States v. Philadelphia Nat. Bank</u> , 374 U. S. 321, 10 L. ed. 2d 915 (1963)-----	124
<u>United States v. Shaughnessy</u> , 347 U. S. 260, 98 L. ed. 681 (U. S. Supreme Court, 1953)-----	60
<u>U. S. v. Mt. Vernon Milling Co.</u> , 345 F. 2d 404 (CA-7, 1965)-----	184
<u>Wilson v. Loew's Inc.</u> , 142 C. A. 2d 183 (1956) [Cert. Den. 355 U. S. 597, 2 L. ed. 2d 519]-----	11
<u>Wisconsin Bankers Association v. Robertson</u> , 190 Fed. Supp. 90 (DC-D.C., 1960); 294 Fed. 2d 714 (CA-D.C. 1961); [Cert. denied 7 L. ed 2d 338; 368 U. S. 938]-----	48
<u>Wood v. Hamaguchi</u> , 207 Cal. 79 (1929)-----	53
<u>Yick Wo v. Hopkins</u> , 118 U. S. 356, 30 L. ed. 220 (1886)-----	189

<u>Regulations</u>	<u>Page</u>
Title 12, Code of Federal Regulations §545.7-----	73
Title 12, " " " " §545.2-----	73
Title 12, " " " " §546.4-----	55
Title 12, " " " " §561.5-----	74
Title 12, " " " " §563.3-----	58, 59

<u>Rules</u>	
Federal Rules of Civil Procedure, Rule 9(b)-----	120
" " " " " Rule 25-----	175
" " " " " Rule 56(e)-----	185, 187

<u>Statutes</u>	
California Financial Code §5258-----	161, 162, 168 169
" " " §7404-----	168
" " " §9003-----	168
" " " §9203-----	162, 166
" " " §9205-----	162, 166
" " " §11000-----	165, 166
The Eleventh Amendment to the U. S. Constitution-----	167, 177
The Fourteenth Amendment to the U. S. Constitution---	167

	<u>Page</u>
Title 12, United States Code §1437-----	5
Title 12, " " " §1461-2-----	5
Title 12, " " " §1464(a-i)-----	1,5
Title 12, " " " §1464(a)-----	45,50,55,56,83
Title 12, " " " §1464(d)-----	1,93,163
Title 12, " " " §1464(i)-----	3,5,17,18,23, 42,63,85,89,90, 92,98,140
Title 12, " " " §1724-----	80,81
Title 12, " " " §1725-----	5
Title 12, " " " §1725(c)-----	1
Title 26, " " " §593-----	15,32
Title 26, " " " §692-----	16
Title 28, " " " §1441-1442-----	163
Title 28, " " " §2361-----	175

Reference Materials

"The Federal Savings and Loan System" Chapter 7, pages 61-63-----	107
"Davis On Administrative Law," Volume 2, paragraph 16.05 pg. 447-----	104
"The 1965 Savings and Loan Fact Book"-----	124
Congressional Investigations----- (Appendix III hereof)	18,19,21,25,27, 34,42,43,61,62, 63,64,69,70, 92,93

INTRODUCTION

All appellants jurisdictional statements and statements of the case are so slanted and misleading that appellees are required to make this statement of what was really decided by the Trial Court and is involved on these appeals.

These appeals involve the treatment to be accorded \$42,000,000 of new savings deposits which in 1962 saved the wrecked and almost destroyed appellee Long Beach Federal. ^{1/}

1/ Appellee Long Beach Federal Savings and Loan Association is hereafter "Long Beach Federal" or "Association". It is a mutual savings and loan association. (12 U.S.C. 1464(a-1)). It is the focal point of 20 years of continuous litigation, seizures and threatened seizures, Congressional Investigations and controversies, repeatedly before the U. S. Supreme Court, this Court of Appeals, the Trial Court, and the California State Trial and Appellate Courts.

Appellee Shareholders' Protective Committee is a committee of savings depositors formed in 1946 which has continuously litigated said controversies before the Courts and Congress. It has been continuously licensed by the State of California every year for the past 20 years.

"Appellants" are Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, both of which are sue and be sued U. S. Government agencies. (12 U.S.C. 1464(d) and 1725(c)). Appellant California Savings and Loan Commissioner is "subject to judicial review in accordance with law" (California Financial Code 5258). References to "appellant" herein do not include said California Commissioner unless so stated.

Appellee Equitable Savings and Loan Association (hereafter Equitable) is a California State Guarantee Stock Company. By merger of Long Beach Federal into Equitable, Equitable assumed all Long Beach Federal liabilities. Long Beach Federal's 60,000 savings depositors each received new savings accounts from Equitable. Thus Long Beach Federal's surplus was released for distribution in the form of Equitable stock among Long Beach Federal's 60,000 savings depositors. As a result of the merger, each Long Beach Federal savings depositor became a savings depositor in Equitable. His new account in Equitable equalled his old account in Long Beach Federal. There also became available for distribution to Long Beach Federal savings depositors a bonus of about 13% in the form of Equitable guarantee stock. How this bonus is to be distributed is the issue of these appeals.

Without the \$42,000,000 of new deposits Long Beach Federal was doomed to extinction and ruin.

Long Beach Federal had lost \$69,000,000 of its savings deposits in a run of withdrawals which reduced its 1960 total of savings deposits from over \$96,000,000 to about \$28,000,000.

The disastrous 1960 run was caused by appellants^{1/} ex parte seizure and two years of mismanagement of the seized Long Beach Federal. The \$42,000,000 of new savings deposits came into appellee Long Beach Federal when the founding management was restored and the remnants of the seized association were returned from appellants 1960-62 seizure.

Appellants attack the Trial Court's judgments with a multitude of technicalities, i.e., lack of power or jurisdiction to decide against appellants. None of these attacks go to the merits, justice or equity of the Trial Court's judgments.

Behind this smoke screen appellants try to conceal their illegal and arbitrary^{2/} ex post facto forfeitures of thousands of appellee savings depositors statutory, contract and charter rights to equal and pro-rata distribution of the \$9,500,000^{3/} surplus of their mutual savings association. This surplus was created by the very savings deposits appellants would forfeit.

The act of Congress expressly requires that all savings

^{2/} Both the Trial Court (233 F. Supp. 578 at 598 and the 1960 Congressional Investigating Committee (Appx. III hereof) found appellants had acted illegally and arbitrarily and that appellants seizure caused the run.

^{3/} All surplus figures are at 1963 prices of Equitable guarantee stock.

depositors " . . . will share on a mutual basis in the assets of the Association in exact proportion to their relative share or account credits," (emphasis added). (12 U.S.C. 1464(1)).

Appellee Long Beach Federal's Charter makes the same requirement. Appellants' forfeitures are wholly ex post facto made by orders promulgated nearly a year after the savings deposits were made.

See paragraph IX. hereof: "Whatever May Be The Power Of The Board Based Upon Findings Of Fact It Cannot Forfeit Plaintiff's Savings Deposits By Mere Edict or Fiat Issued After The Deposits Were Made". Appellants would mislead this Court of Appeals.

They say appellee Long Beach Federal savings depositors "approved the Merger Agreement overwhelmingly at their meeting" [Opening Brief of appellants Federal Home Loan Bank Board, et al., page 16], thereby implying that appellants' ex post facto forfeitures were approved by appellee savings depositors. But the truth is that:

" . . . 96% of all the votes cast for said merger at said meeting were cast by plaintiffs holding the proxies of savings shareholders and voting such proxies so held. Said ballot by its terms stated that the votes thereby cast were voted in reliance upon the provisions in said Merger Agreement permitting recourse to the Courts for a Court determination of the validity of said attempted preference and exclusion insisted upon by the

defendants Bank Board and Insurance Corporation."
[3R-1136] 3A/

3A/ Said ballots by which said 96% votes was cast read
in part:

"This ballot is cast in favor of said merger
in reliance upon:

- "1. That portion of the merger agreement, proxy
statement, etc., which reads as follows:

'This Agreement is not intended to prohibit
any shareholder member of Long Beach from
taking appropriate action to exercise such
rights, if any, which he may have to contest
the merits or validity of the plan of
dissolution of Long Beach, or any part thereof,
incorporated herein.', and

- "2. The action of the Federal Home Loan Bank
Board, Federal Savings and Loan Insurance
Corporation, et al., in approving said
merger agreement, proxy statement, etc.,
containing said above quoted language.

"DATED this 6 day of July, 1963.

"Executed as proxy holders for and
on behalf of the shareholders whose
savings accounts are listed on
Exhibit 'A' attached hereto.

"ROBERT H. WEBB, JOHN (BEANS) REARDON,
SID ELLIOTT, WINNIE BUCKLIN and
MABEL FERGUS"

STATEMENT

These appeals are to decide whether appellants must follow the Acts of Congress which created them or whether appellants as administrative agencies can ^{4/}repeal, ignore, or amend the express terms of such Acts of Congress. The Trial Court held appellants must follow the Acts of Congress and could not repeal or ignore them. (233 F. Supp. 578 at 592-596, Appx. 1(a)).

The express terms of the Acts of Congress require equal and pro-rata participation of all appellee Long Beach Federal's 60,000 savings depositors in the distribution of Long Beach Federal's \$9,500,000 of surplus. The surplus results from the merger of appellee Long Beach Federal into appellee Equitable. Appellants would forfeit about \$2,500,000 of such surplus by taking it from the thousands of savings depositors to whom it belongs and give it to other savings depositors who have already received their full, equal and pro-rata shares.

The Acts of Congress require mutuality and equality with all savings depositors sharing "on a mutual basis in exact proportion to their relative share account credits". (12 U.S.C. 1464(i) also (a)). Appellants would forfeit thousands of appellee savings depositors by denying them any part of the Long Beach Federal surplus. The \$9,500,000 surplus was created by the very savings

4/ 12 U.S.C. 1464(a-1) creates Federal Savings and Loan Associations as "mutual" associations.

12 U.S.C. 1461-2 contain definitions.

12 U.S.C. 1437 creates appellant Federal Home Loan Bank Board as a "sue and be sued" agency.

12 U.S.C. 1725 creates appellant Federal Savings and Loan Insurance Corporation as a "sue and be sued" United States Corporation.

deposits appellants would forfeit. The forfeited shares are given by appellants to the savings depositors who have already received their full pro rata share. Thus, different classes of preferred and of excluded savings depositors are created by appellants in appellee Long Beach Federal. The preferred classes get their own full pro rata shares of Long Beach Federal's surplus and also get the forfeited shares of their forfeited fellow depositors.

The forfeited savings depositors get nothing.

But there can be no preferred and no excluded savings depositors in any mutual savings association. In a mutual, all must share alike. Otherwise, the association is no longer mutual. ^{5/}

Congress required appellee Long Beach Federal and all Federal Savings and Loan Associations to be completely mutual.

Such classes of preferred and forfeited savings depositors are created by appellants in appellee Long Beach Federal alone. All the more than 2000 other federal savings and loan associations were left as Congress directed, as mutual associations with all depositors sharing equally. But if appellants can forfeit Long Beach Federal's thousands of depositors all rights of all federal savings depositors thereafter exist only at the whim of appellants.

Appellants falsely pretend that Long Beach Federal was harmed and not benefited by the \$42,000,000 of new savings deposits.

But it is undeniable that:

A. Appellants ex parte seizure of Long Beach Federal

^{5/} See paragraph II, page 45 hereof. Federal Savings and Loan Associations are required by Congress to be mutual Associations.

caused a \$69,000,000 run of savings withdrawals by thousands of terrified and intimidated savings depositors.^{6/} This is over 70% of the total deposits of \$96,000,000 on the day of seizure. Only \$30,000,000 (less than 1/3) of its savings deposits remained when the remnants of the wrecked Long Beach Federal were restored to its founding management.

B. The wrecked and damaged remnants of Long Beach Federal had no goodwill when less than 1/3 of its seized savings deposits remained.^{7/} [3R-1138-1140]

C. More than \$42,000,000 of Long Beach Federal's seized assets were used up to pay over \$45,000,000 of demand debts created by appellants seizing employee Supervisory Representative in Charge Ault to appellant Federal Savings and Loan Insurance Corporation after the seizure.^{8/}

Appellants falsely claim the \$42,000,000 of new savings deposits were not needed and should have been rejected by the newly restored management of Long Beach Federal.

But the urgent need for these new savings deposits is self evident.

^{6/} See page 25, 69-70 hereof for details of runs.

^{7/} Plaintiff's Exhibit "8" Settlement Agreement, page 16.

^{8/} For uniformity of record references among all briefs, appellees will use the same references as appellants; i.e., "to the original papers in No. 20378 (D.C. No. 63-1072 PH), No. 20447 (D.C. No. 63-1230 PH) and No. 20522 (D.C. No. 63-1107 PH) are designated "1R", "2R" and "3R", respectively. References to the transcript of the proceedings in the District Court are designated "Tr."."

Upon seizure by appellants a \$69,000,000 run took about 70% of the \$96,000,000 of savings deposits. But \$30,000,000 of deposits remained when the remnants of the wrecked and damaged association were returned to its founding management. After the return of the association the total withdrawals of savings deposits from appellee Long Beach Federal for four months, April 2, 1962 through July 31, 1962, was over \$13,000,000. The total new deposits for the same time was \$49,000,000.^{9/} The net gain for four months was about \$35,000,000. But had there been no new deposits all withdrawals would have been a net loss. The net loss would have been over \$13,000,000. There were only \$30,000,000 left in savings deposits when the Association on April 2, 1962 was restored to its founding management.^{9/} \$13,000,000 is about 44% of this total. If Long Beach Federal had lost 44% of its remaining deposits within 4 months after being restored to its original management the depositors would again have become panic stricken as they had in the 1960 and in 1946 runs.

The 1960 run was \$69,000,000 or 70% of the 1960 deposits of \$96,000,000.

There was bound to be panic and a run if the trend of withdrawals of 1960-1961 had once gotten started. Even with the \$49,000,000 flood of new money coming in over \$13,000,000 went out. What would have been the total withdrawals if no new money came in? The resulting run would have completely wiped out appellee Long Beach Federal.

The forced sale sacrifice of assets needed to raise \$13,000,000 cash (44% of all deposits) to immediately pay withdrawing panicky depositors would have wiped out all surplus, rendered Long Beach Federal insolvent and forced it to close forever.

Only the rapid and widely advertised flow of new deposits into Long Beach Federal prevented panic and disaster. \$24,000,000 of new deposits came in the first two days. Day after day full page ads telling of the daily amounts of such millions of new deposits were placed in the local newspapers. 10/

This alone re-established lost public confidence and prevented disaster.

Yet appellants insist that accepting the \$42,000,000 of new deposits was "a breach of trust". They were not needed, and should have been rejected.

Appellants would thereby have provoked another and third disasterous run of withdrawals which would have completely destroyed Long Beach Federal.

Appellants false claims that the \$42,000,000 of new deposits were "not needed" is coupled with the equally false claim that the \$42,000,000 of new deposits "diluted" the distribution of Long Beach Federal surplus among all its savings depositors.

The truth is that the benefits caused by the \$42,000,000 of new deposits increased the total distribution by about 10 times and each individual savings depositor received about 4 times more

with the new deposits than could have been received without them.
[3R-1137-1139]

Without the \$42,000,000 of new deposits a distribution of only about \$842,000 was possible among Long Beach Federal's thousands of mutual savings depositors. [3R-1138]

With the \$42,000,000 of new deposits about \$9,500,000 became available for distribution. This increased the total distribution about 10 times. It increased the individual share of each savings depositor about 4 times. \$842,000 divided among \$30,000,000 of savings deposits is about 3%. \$9,500,000 divided among \$72,000,000 is about 13%. ^{11/}

Thus the thousands of new savings depositors created the surplus which both old and new savings depositors should share equally. [3R-1138-1140; 3R-1169-1170]

^{11/} See page 16-17 hereof for details of how new deposits increased distributable surplus.

These appeals are the culmination of over 20 years of continuous litigation repeatedly before the U. S. Trial Court, ^{12/} this Court, and the U. S. Supreme Court. They deal with a series of financial miracles almost beyond belief.

Appellee Long Beach Federal is a mutual federal savings association wholly owned by its more than 60,000 savings depositors.

Appellee Shareholders' Protective Committee represents and sues on behalf of all said savings depositors as a class.

Appellee Long Beach Federal has been twice seized and ^{13/} wrecked by appellants. It has been threatened with other

^{12/} See Trial Court's Opinion (Appx. 1(a) hereof) (233 F. Supp. 78, page 584), for partial list of over 400 pages of reported opinions is part of this litigation.

In Re Woodmar Realty Company, 294 F. 2d 785 (CA-7, 1961), Cert. Denied 369 U. S. 803, 7 L. ed. 2d 550] at page 788:

"[2,3] Counsel first contends that we must pretend that the record facts laboriously compiled in the records and files of the court below in more than twenty years of proceedings do not exist and that we may not on this appeal take judicial notice of such facts. It is elementary that the court below was duty bound to take judicial notice of its records and files in this cause and that it is our duty to take notice of facts which have come to our knowledge through the records presented to us on the several appeals in this same case. (Citing Authorities)"

Wilson v. Loew's Inc., 142 C. A. 2d 183 at 188, footnote 3 contains comprehensive lists of U. S. Supreme Court, Ninth Circuit and other appellate court decisions on the matter of judicial notice taken by both trial and appellate courts of Congressional proceedings, etc.

See also:

Pan American Petroleum & Transp. Co. v. United States, 273 U. S. 456, 71 L. ed. 734 (1927), at U. S. 498-499, L. ed page 744 the testimony before Congressional Committees.

^{13/} Appellant Savings and Loan Commissioner of the State of California is not included in any reference to appellants unless specifically so referred to.

seizures and destruction which were blocked by Federal Court injunctions. (14 F.R.D. 273 and 189 F. Supp. 589.)

The 1946-1948 seizure caused a \$10,000,000 run of withdrawals by terrified and intimidated savings depositors.

The first of this litigation resulted from that seizure in 1946.

In 1948 as a result of Congressional Investigations and Federal Court judgments, appellants returned the remnants of the seized and wrecked association to the same management from which it had been seized. The Court judgments required appellants to account for over \$26,000,000 of uncounted cash, U. S. bearer bonds and negotiable securities for which appellants had refused to give any receipts upon seizure. ^{14/}

Appellants attempts to account were rejected by the U. S. Court.

Long Beach Federal was about to convert in 1960 from a Federal to a California state association. Appellants unable to account for the first seizure and to block the 1960 conversion again seized, wrecked and attempted to destroy Long Beach Federal. A \$69,000,000 run of withdrawals by terrified and intimidated depositors was caused by the 1960 seizure. On the date of seizure savings deposits exceeded \$96,000,000. In the run they dropped to about \$28,000,000.

In 1962 as a result of further Congressional

^{14/} The Trial Court and this Court of Appeals take judicial notice and knowledge of the prior litigation and Congressional proceedings. (See Footnote 12, page 11 hereof.)

Investigations and more state and federal court litigation, appellants returned the remnants of the seized Long Beach Federal again to the same management from which they had seized it in 1946 and in 1960. In 1962 appellants paid over \$5,000,000 in settlement of damage actions by appellees Long Beach Federal and Shareholders' Committee against appellants. [3R-1126-1127; 3R-1140-1141]

In 1963, \$9,500,000 of new surplus was obtained for distribution among 60,000 Long Beach Federal mutual savings depositors represented by appellees. It was caused by the \$42,000,000 of new deposits and the restored goodwill they created. [3R-1139 and 1169-1170]

A \$7,000,000 partial distribution of this surplus in the form of stock of appellee Equitable has been made in 1963 by the Court below, by final consent judgments not directly affected by these appeals. [3R-167-179; 3R-180-190; 3R-307-311] The distribution of the remaining \$2,500,000 of Equitable stock is the subject of the present appeals. ^{15/}

The \$7,000,000 partial distribution was made by appellee Long Beach Federal Savings and Loan Association in 1963-1964 after being twice wrecked and almost destroyed by malicious and punitive repeated seizures and runs inflicted by appellants Federal Home Loan Bank Board, et al. ^{16/}

Appellants' 1960 seizure of appellee Long Beach Federal

^{15/} All stock \$ figures are at 1963 prices of Equitable stock.

^{16/} See page 42-44 hereof for Congressional Investigating Committee's findings re seizures and runs.

caused a \$69,000,000 run which reduced appellee's savings deposits by 70% from \$96,000,000 in 1960 to less than \$30,000,000 in 1962. [3R-1126-1163]

Appellees by Congressional Investigations and State and Federal Court actions, compelled appellants in 1962, to return the remnants of the seized Long Beach Federal and to pay over \$5,000,000 in damages for wrongful seizure. Appellants were also compelled to allow conversion by merger of appellee Long Beach Federal into appellee Equitable. [Pl's. Exh. "8" page 43-48]

But even with these victories only about \$842,000 (not \$9,500,000), [3R-1138] of surplus was then available for immediate distribution among Long Beach Federal's then (1962) only \$30,000,000 of savings deposits.

The difference between a \$842,000 and a \$9,500,000 distribution was created by about \$42,000,000 of new savings deposits which came into Long Beach Federal in 1962. [3R-1136-1137] About \$24,000,000 of these new deposits came into Long Beach Federal within the first two days of its 1962 return to its founding management from appellants' seizures. These are the savings deposits appellants would partially forfeit and penalize.

Appellants were thwarted in their repeated seizures and 20 years of efforts to destroy and ruin Long Beach Federal. Smarting under the \$5,000,000 of damages, they were compelled to pay Long Beach Federal, appellants bitterly resented \$24,000,000 of new savings deposits coming into the wrecked and almost destroyed Long Beach Federal on the very day appellants were ousted by

Federal Court orders.

Appellants made every effort to prevent or minimize any distribution of Long Beach Federal surplus among the 60,000 Long Beach Federal savings depositors who had recovered their seized Association from appellants. [3R-1131]

Appellants required \$3,000,000 of Long Beach Federal's new surplus to be withheld from distribution for 10 years to indemnify appellants against their own wrongs, i.e., appellants' liability to Long Beach Federal's customers for losses caused by appellants' two years (1960-1962) of mismanagement of the seized Association. [Pl's. Exh. "8" page 46] This cut heavily into any possible distribution.

If distribution was made without the new deposits, Federal and State income taxes of about \$3,884,000 were estimated on the \$5,000,000 of damage recoveries and on other Association assets. [3R-1141-1142] This also would have greatly reduced any possible distribution.

Appellants sought to increase, instead of reduce, those unnecessary taxes on the \$9,500,000 distribution.

But the \$42,000,000 of new savings deposits carried with them a 12% tax shelter under 26 U.S.C. 593. 12% of \$42,000,000

is \$5,000,000. ^{17/}

A wrecked and damaged Long Beach Federal Savings and Loan Association which in 1962 had just suffered a \$69,000,000 run, (more than 70% of its 1960 savings deposits of \$25,000,000), obviously had no goodwill. [3R-1139 and 1169-1170] But the miracle of \$42,000,000 of new savings deposits in 8 months, \$24,000,000 of which came in two days, partially restored Long Beach Federal's badly damaged goodwill. [3R-1139 and 1169-1170]

Appellee Equitable, solely because of the \$42,000,000 of new savings deposits:

(a) Paid \$3,000,000 (almost one-third of the total distribution of \$9,500,000) for Long Beach Federal goodwill restored by the new savings deposits.

(b) Assumed Long Beach Federal's obligation to withhold another and separate \$3,000,000 of surplus from any distribution for 10 years to indemnify appellants against their own wrongs. Such assumption released this \$3,000,000 for immediate

^{17/} The U. S. Trial Judge commented upon this tax shelter in his opinion of 233 F. Supp. 578 (Appx. I-a hereof) in a footnote at page 599 where he said:

"The Board insists that the large deposits 'diluted' the share of surplus which would go to the small depositors. It is unnecessary to decide that, but it is worthy of note that several hundred of the accounts, whose right to share would be forfeited because they were pledged, are for less than \$500.00, and that the 42 million dollars additional deposits which were in the institution on December 31, 1962, gave the Association a decided tax advantage in enabling it to write off, under the then existing laws, 12½ per cent of that amount, viz.: more than five million dollars, as bad debt reserve. And five million dollars contributing to a tax shelter is not tiddly-winks. . . ."

26 U.S.C. 596 as it was in 1962 permitted any mutual savings association to take 12½% of its total savings deposits as a deduction against U. S. income taxes.

distribution.

(c) Assumed Long Beach Federal's liabilities, if any, for the possible \$3,884,000 of Federal and State income taxes.

Equitable agreed to merge with Long Beach Federal. [3R-1138-1140; 1167] Equitable had almost \$15,000,000 in net worth, surplus reserves, etc. [Pl's. Exh. 7-A-4-3, page 6; also 12/9/63-10-A] This, plus the \$5,000,000 tax shelter created by the \$42,000,000 of new savings deposits obviated any possible \$3,884,000 (or any other) taxation on Long Beach Federal.

The thousands of new savings depositors who created almost all of the \$9,500,000 distribution are now accused by appellants Bank Board of making " . . . a raid on the Federal Association's net worth . . . " and are partially forfeited and penalized from any participation in the \$9,500,000 surplus and distribution they created.

This more than ten times increase in distribution from about \$842,000 to \$9,500,000, is falsely labeled by appellants as a "dilution". Such non-existent "dilution" is then made the pretended basis of appellants forfeitures and penalties against the new savings depositors. Such is in the teeth of the applicable Act of Congress and contradictory of its plain terms which require:

" . . . in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits." . . . " (Emphasis added)

(12 U.S.C. 1464(i); 233 F. Supp. 578 at 592, Appx. I-a hereof.)

In April 1960, appellee Long Beach Federal had \$96,000,000 in savings deposits owned by its then 90,000 mutual savings depositors. They were about to convert their mutual Association from a Federal to a California State Association. By Acts of Congress (12 U.S.C. 1464(1), Appx. I-f hereof), they had an absolute right to make such conversion. No approval of appellant Bank Board was required.^{18/}

In order to block this lawful conversion, appellants in 1960 seized and wrecked the Association. A Congressional Investigation Committee so found (quoted hereafter at pages 42-44 at greater length). It investigated appellants' seizures and condemned them in the strongest language. In 1960 the Committee said:

" . . . The board's . . . action must be characterized as arbitrary and unlawful of the most reprehensible sort. . . . In preventing the conversion the board deprived the Association of a right created by . . . Congress . . . without mincing words, we may say this is a form of regulatory supervision by blackmail. . . . The Board's action was an arbitrary and unlawful exercise of power. . . . "

^{18/} Federal Home Loan Bank Board v. Greater Delaware Valley S. & L. Ass'n., 277 F. 2d 437 (CA-3, 1960). In Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert. Den. 380 U.S. 915; 13 L. ed. 2d 800]. This Court considered the Greater Delaware Valley Federal decision and said at page 157:

" . . . In that case the Bank Board sought a declaratory judgment voiding the conversion of a Federal Savings and Loan Association from a federal to a state charter until the approval of the Bank Board was obtained. No duty on the part of the Association to obtain Bank Board approval existed either at common law, by statute or by Bank Board regulations. . . ." (Emphasis added.)

This language was by the third Congressional Committee to investigate appellants and their seizures of Long Beach Federal during the 20 years of vendetta by appellant Board against appellees Association and its Shareholders' Protective Committee.

Yet further Congressional inquiries of appellant Board and the Board Chairman's conflicting and contradictory testimony before said Congressional Committee in 1963 are detailed on pages 1-63 hereof.

Appellants falsely pretend they are "protecting" small savings depositors against "dilution" by larger depositors. But the U. S. District Court found, ^{19/} and the truth is, that appellants' forfeitures and penalties are inflicted upon about 1899 savings accounts. Of these:

- (a) 324, or about 17%, are \$500 each, or less;
- (b) 1524, or over 80%, are \$11,000 each, or less; and
- (c) Only 54, or about 3%, are \$100,000 each, or over.

Nor are the forfeitures or penalties upon savings accounts limited to new, or small, accounts. Appellants would forfeit and penalize every savings account which is pledged or assigned as security for any depositor's debt. This is regardless of the size or age of the forfeited savings account.

Hundreds of the forfeited savings accounts have been in the Association and pledged or assigned for five years or longer. Many are tiny accounts from \$500 down to as low as \$20 - \$10 per account. Others range in size up to \$100,000 or more each.

But all are forfeited.

Appellants failed to deny in any way before the District Court that the \$42,000,000 of new savings deposits:

- (a) Created the \$3,000,000 of goodwill;
- (b) Released another and separate \$3,000,000 for immediate distribution instead of it being retained for 10 years; and
- (c) Also created the more than \$5,000,000 of income tax shelter which saved about \$3,884,000 of possible income taxes.

With these as undenied (and undeniable) facts before it, the District Court rejected appellants wholly unsubstantiated claims of "dilution" and "breach of fiduciary duty" by appellee Long Beach Federal in accepting the \$42,000,000 of new savings deposits. Inevitably, summary judgment against appellants followed. It is from these rulings that they appeal.

Against the background of these undenied and undeniable facts, this Court of Appeals should carefully scrutinize appellants' briefs. They are replete with misleading distortions, half truths and misstatements, only the most glaring of which can be refuted
20/ herein.

20/ Appellants have twice briefed these appeals. Appellants' first briefs made more than 70 references to documents never seen by the Trial Court and never offered or received in evidence. Upon appellees motions this Court of Appeals required appellants to file new briefs and omit therefrom references to matters never presented to or considered by the Trial Court. (Order of September 20, 1966 by this Court of Appeals in these appeals No. 20522, No. 20447 and No. 20378).

For over 20 years appellants Bank Board have been penalizing and forfeiting Long Beach Federal savings depositors and continuously persecuting the Association. In 1946, the predecessor of appellants made their first ex parte seizure of Long Beach Federal. The seizure was made upon accusations of "unsafe and unfit management".^{21/}

The seizure was completely ex parte, without any notice, hearing, or opportunity to be heard. Appellants sought and obtained scare headline, front-page newspaper publicity of their seizure of the Association and their unfounded charges of "unfit" and "unsafe" management.^{21/}

A \$10,000,000 run of withdrawals immediately ensued. Thousands of savings depositors formed long lines in front of the Association and withdrew nearly one-half of the then total of \$22,000,000 of savings deposits. [3R-1125]

The original Shareholders' Protective Committee of Long Beach Federal was then founded. It has been in continuous existence suing appellants for 20 years. It commenced the first Federal Court action which went to the U. S. Supreme Court.

[1R-5-7] A Congressional Investigating Committee in 1946 heard the appellants' charges from their own lips by the testimony of the then Federal Home Loan Bank Administration officials.

The 1946 Congressional Committee found:

"The action here complained of was not only a disservice to the Government but also a greater disservice to the people for the

protection of whose rights and affairs our Government exists. . . . "

After almost two years (1946-1948) of ruinous operation of the seized Association, appellants returned the remnants of the Association in January 1948 to exactly the same management from which they had seized it. [3R-1125-1126]

The Shareholders' Protective Committee had in 1946-1948 obtained the proxies of an overwhelming majority of all of the savings depositors of the Association. (233 F. Supp. 578 at 584, Appx. I-a hereof) After the 1948 return of the Association, the litigation continued in the U. S. Courts for trial, with the Shareholders' Protective Committee seeking to enforce the Federal Court judgment which required appellants to account for the \$26,000,000 of seized assets of the Association. (233 F. Supp. 578 at 584, Appx. I-a hereof)

Upon the 1946 seizure, over \$26,000,000 of uncounted cash, U. S. Bearer bonds, and negotiable securities, had been taken by appellants. All receipts for the seized uncounted cash and bearer bonds, etc., were refused. [14 F.R.D. 273]

Appellants' first attempted accounting with the U. S. District Court was rejected by that Court. Unable to account, appellants, in 1949, made another seizure order for the liquidation of the Association they had returned in 1948.

This seizure order however, was upon notice, and required a hearing. The U. S. Trial Court promptly enjoined the 1949 seizure and instead required appellants to submit their renewed

charges of "unfit and unsafe management" to the U. S. Courts for trial. [14 F.R.D. 273]

Instead appellants appealed, and after about 4 years, in 1953, the injunction was dissolved and appellants were free to conduct any hearings, or take any action they desired.

Seven years followed, from 1953 to 1960. The litigation continued but appellants did nothing either to submit their charges to the Courts or to conduct any hearing of their own. [189 F. Supp. 589]

Every time the U. S. Trial Court took any step in the pending litigation, appeals or writs were taken by appellants, who thereby effectively blocked any trial ever being had on the Shareholders' Protective Committee 1946 actions for accounting and damages.

In 1959, Long Beach Federal determined to convert from a Federal to a State Association. [Pl's. Exh. 10-A, pages 12-14] Such a conversion was authorized by Acts of Congress, 12 U.S.C. §1464(i), and required no consent or approval of appellants Bank Board.^{22/} Had the conversion taken place, the Association and its Shareholders' Protective Committee would have been free to prosecute the pending litigation for an accounting and for damages, against appellants, without the threat of the Association being seized and liquidated.

^{22/} Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert. denied 380 U. S. 915; 13 L. ed 2d 800, March 1965]; Federal Home Loan Bank Board v. Greater Delaware Valley Fed. S. & L. Ass'n., 277 F. 2d 437 (CA-3, 1960) see page 132-133 hereof for quotations.
& 140

The U. S. Trial Court found in enjoining the 1949 threatened seizure, that appellants were then threatening to seize the Association because they were unable to account and that appellants sought to appoint themselves as receivers to obtain control of the Association's litigation against appellants, and thereby dismiss it without trial. [14 F.R.D. 273 at 293-295]

By April 1960, the conversion had proceeded so far that California Savings and Loan Association examiners, on April 6, 1960, entered the Association for the purpose of examining its condition so that the California Commissioner might give his consent to such conversion. [233 F. Supp. 578 at 585]

April 12, 1960, the U. S. Court of Appeals for the Third Circuit, decided Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings and Loan Association, 277 F. 2d 437, (CA-3, 1960). This decision held that a Federal savings and loan association could convert from a Federal to a State association without appellant Bank Board's consent, and regardless of the Bank Board's opposition.

Just 10 days later, Long Beach Federal was again seized by appellant Bank Board. This seizure was also ex parte, wholly without notice, and was based in a large part upon the then 14-year old and yet untried charges of "unsafe and unsound" management.

Again, with minor exceptions, appellants refused to give receipts for the over \$120,000,000 of seized assets. [Pl's. Exh. "10-B" pages 390-393]

By 1960, the Association had grown to have over

\$96,000,000 in savings deposits, and over 90,000 savings depositors.

The same destructive seizure pattern was again followed by appellants. They deliberately undermanned the 30-teller windows of the Association with only 4 tellers, so that long lines of withdrawing savings depositors again were formed in front of the Association. [Pl's Exh. "10-B" page 810] Front-page scare headline newspaper publicity was obtained by appellants' "press releases". [Pl's. Exh. "10-B" pages 787-789 and 793-803] They even hired a press agent to get their publicity.

As a result over \$69,000,000 of savings deposits were withdrawn by terrified and intimidated Long Beach Federal savings depositors. This was about 70% of all the savings deposits then in the Association.

The Shareholders' Protective Committee was then in its 14th year. It has now been (1966) licensed continuously every year for 20 years, by the State of California. [233 F. Supp. 578 at 591] It obtained new proxies [Pl's. Exh. "2"] from more than a majority of the 1960 savings depositors, and filed new court actions, and sought further Congressional Investigations. [Pl's. Exh. 12/9/63-8 page 15]

The 1960 Congressional Investigating Committee summoned appellants to testify under oath concerning the reasons for the 1960 seizure of Long Beach Federal. The then Bank Board Chairman and Bank Board members who were subpoenaed, appeared before the Congressional Committee and refused to testify on the basis that the seizure was justified and the justification would be fully

disclosed before an administrative hearing to be held by a Hearing Officer. When the administrative hearing convened, appellants Bank Board members and Chairman were subpoenaed by appellees to appear in Los Angeles, California, and state why the Association had been seized and ruined.^{23/}

The then Chairman, members, etc., of appellant Bank Board flouted the subpoenas and refused to appear or to testify.^{23/} They ordered their "handpicked" hearing examiner to rule that no evidence would ever be received as to reasons or justifications, if any, for the ex parte seizure. Instead, only "current conditions" would be heard. [189 F. Supp. 589 at 603-604] Current conditions were:

(a) The Association when seized April 22, 1960 had \$96,000,000 of savings deposits and was indebted to no one;

(b) By the time of the 1960 Administrative Hearing, the Association had, in 4 months, lost over ^{24/}\$60,000,000 of its savings deposits, and but \$35,000,000 remained. The Association was allegedly in debt \$45,000,000 on a new demand debt created by appellant Bank Board in favor of appellant Federal Savings and Loan Insurance Corporation, since the seizure. Appellants' "handpicked" hearing examiner not only refused to compel the Board Chairman or Board Members to honor the subpoenas and testify, but sought to enforce a hearing on the said

^{23/} L. B. Fed. S & L Assn. v. Fed. Home Loan Bank Board, 189 F. Supp. 589 (1960) at 599 details these events.

^{24/} Another \$9,000,000 of savings deposits were later lost bringing the total run to over \$69,000,000.

"current conditions". The outcome of such a hearing was obvious. The Association, \$47,000,000 in debt, due on demand, with only \$35,000,000 left in savings deposits, was obviously insolvent.

Its liquidation seemed certain.

But neither the U. S. Trial Judge, who has heard this litigation for 20 years, nor this Court of Appeals, would permit such an outrage.

In "handpicking" their hearing examiner, appellants had adopted two resolutions on the same day, one of which, together with correspondence, disclosed that appellants' General Counsel had shopped around and himself selected the hearing examiner who would seal the seized Long Beach Federal's doom.

One only of the two of appellants' resolutions was sent to Long Beach Federal's counsel by registered mail. The other, although passed the same day, and on the same subject, was concealed up the appellants' sleeve for months, to be sprung as a surprise before the U. S. District Court at Los Angeles. ^{25/}

Appellants' General Counsel himself, testified before the 1960 Congressional Investigating Committee "I selected him [the hearing office]." The U. S. District Court in 189 F. Supp. 589, at page 606 at footnote 12, condemned such conduct.

This Honorable U. S. Court of Appeals went even further and in Federal Home Loan Bank Board v. Long Beach Federal Sav. & Loan Assn., 295 F. 2d 403, at page 411, held the selection of the Hearing Officer was a violation of the Administrative Procedure

Act, was illegal and void, and that said "current conditions" could not be used to decide the fate of the seized Association.

This decision of this Court of Appeals was filed in November, 1961.

Within 3 months, on February 14th, 1962, appellants Bank Board, et al., agreed to again return the remnants of the twice seized Long Beach Federal to exactly the same management from which it had been seized in 1946, and to which it was returned in 1948. [Pl's. Exh. "8" Settlement Agreement]

But in 1960-1962, appellee Long Beach Federal had been wrecked and almost destroyed under the two years management of the seizing appellants. Less than \$30,000,000 remained of the original \$96,000,000 of savings deposits. Over \$1,000,000 in operating losses were suffered by the Long Beach Federal in 1962 resulting from the 1960 seizure.

But this time, appellants paid over \$5,000,000 in settlement of damages to the Long Beach Federal for their wrongful seizure and mismanagement of the Association's business. [3R-1140-1141] As part of the February 1962 settlement [Pl's. Exh. "8"], appellants also agreed that Long Beach Federal might convert from a Federal to a State Association, and might, if possible, merge with Equitable. But even here appellants persisted in their destructive and ruinous "supervision" of Long Beach Federal.

Appellants required that \$3,000,000 of Long Beach Federal's assets be withheld from distribution to its depositors and be retained for 10 years as "protection" of appellants Bank

Board and Insurance Corporation, against the actions and claims of the customers of the seized Long Beach Federal for mismanagement and damage inflicted by appellants upon said customers. [Pl's. Exh. "8" page 46]

Upon its 1962 restoration to the founding management, Long Beach Federal was in a precarious condition. It had only about \$30,000,000 of its original \$96,000,000 in savings deposits. Long Beach Federal's goodwill built so laboriously over 28 years by the founding management, was now non-existent. [3R-1138-1140; 3R-1166]

Unless multi-millions of dollars of new savings deposits could be immediately obtained in large volume, Long Beach Federal could not merge with Equitable and might not even survive. Unless Equitable could be persuaded to assume all of Long Beach Federal's liabilities, known or unknown, \$3,000,000 of Long Beach Federal's surplus available for distribution among its savings depositors must be retained for 10 years to protect appellants Bank Board and Insurance Corporation against liability for their own wrongdoing. [Pl's. Exh. "8" page 46]

Long Beach Federal and its management, as well as Equitable's management, when they learned in 1962 that Long Beach Federal would be restored, made monumental efforts to attract and obtain every possible new savings deposit in all amounts, large as well as small. As a result \$24,000,000 in new savings deposits became available to the restored Long Beach Federal within two days after it resumed business under its founding management. And this

growth continued until almost \$42,000,000 in new savings deposits came into Long Beach Federal from April 2nd to the end of November, 1962.^{26/}

These are the savings deposits appellants Bank Board and Insurance Corporation would ex post facto partially forfeit and penalize. Almost one-half of these new savings deposits or over \$19,000,000 are denied by appellants their just and lawful statutory and charter participation in the surplus of Long Beach Federal, which they helped to create.

These new savings deposits were the blood transfusion that saved the dying Long Beach Federal from the fate appellant

^{26/} Front page newspaper publicity was given to the \$24,000,000 of new deposits received during the first 2 days. Full page ads were placed every day in the local newspapers [Pl's. Exh. 12B]. Movie and T. V. stars made personal appearances at Long Beach Federal and autographed new accounts. They also offered their own new savings accounts of from \$100,000 to \$300,000 each. [Pl's. Exh. 11] One of appellant Bank Board members, its counsel, et al., were photographed with the stars in the premises of Long Beach Federal. [Pl's. Exh. 11]

Appellants now deny any knowledge that dozens of movie and T. V. stars were each opening said \$100,000 to \$300,000 new accounts [3R-1411 and 3R-1359-60] Appellant Bank Board Member Dixon swore in his affidavit that he was in Long Beach, California from March 20 to April 6, 1962, for the purpose of the settlement and return of the seized Association. He says " . . . I then turned over the keys of the Association to Mr. Thomas A. Gregory, its President." [3R-1412] He also swore:

" . . . Newspapers in Los Angeles and Long Beach carried stories as to the amount of deposits at Long Beach following its return to its private management on April 2, 1962. One newspaper account, dated April 3, 1962, stated that the Association's deposits on April 2, 1962 were \$22,776,984. Another newspaper story, dated April 11, 1962, stated that redeposits of the Association in one week were more than '29 million dollars'."

The newspaper ads and front page publicity headlined the \$24,000,000 of new savings deposits and featured the pictures of the movie and T. V. stars. [Pl's. Exh. 12-B]

Bank Board had intended for it.

The undenied affidavits before the U. S. District Court, including that of T. A. Gregory, [3R-1125-1163] President of Long Beach Federal affirmed:

(a) That the approximately \$42,000,000 of new savings deposits increased the amount available for distribution among all savings depositors from about \$842,000 to \$9,500,000. If the Acts of Congress and the Association's charter prevail, this increase of more than 10 times, will be shared equally and pro rata among all \$72,000,000 in savings deposits.

(b) That the increase of more than 10 times the total distribution, although spread among a greater number of savings depositors, yet results in about 4 times more being received by all, both old and new, than would have been received by the old depositors without the increase.

The \$42,000,000 of new savings deposits conferred the following major benefits:

(a) Equitable paid \$3,000,000 in guarantee stock for the goodwill of the restored Association. Said goodwill resulted solely from the new \$42,000,000 of savings deposits. [3R-1138-1140; 3R-1167]

(b) The additional \$3,000,000 to be impounded for 10 years was released for immediate distribution among the Long Beach Federal depositors. Equitable's assumption of all Long Beach Federal liabilities, known as well

as unknown, made this release possible.

(c) Approximately \$3,884,000 of possible income taxes were saved. The \$42,000,000 in new savings deposits under 26 U. S. C. 593 created a tax shelter of 12% or about \$5,000,000. This tax shelter enabled Long Beach Federal to received the \$5,000,000 compensation paid it by appellants Bank Board and Insurance Corporation as damages, tax free. The \$5,000,000 tax shelter also enabled Long Beach Federal to transfer its surplus to Equitable without taxes which might otherwise have wiped out the distribution. ^{27/}

Appellant Bank Board's real purpose in these appeals is apparent, as inadvertently but truthfully stated by its own attorney. Said appellants want to further "penalize" those Long Beach savings depositors who made new deposits in the

Association after it was restored in April, 1962, from the second seizure. 28/

28/ On July 13, 1964, Assistant U. S. Attorney Dooley, one of appellants' attorneys, wrote a letter to counsel for appellee Long Beach Federal. A photocopy of said letter is Appx. I-b hereof. Page 1 of said letter reads in part:

"POSSIBLE SETTLEMENT FORMULA

"1. Long Beach shareholders whose accounts were assigned as security for the payment of local sales taxes should not be penalized provided each such shareholder is otherwise eligible under the merger agreement formula." (Emphasis added.)

The reference by appellants' attorney to "penalized" as the effect of the Bank Board's illegal forfeitures is an exact and accurate description of what his clients, appellants Bank Board and Insurance Corporation have done to thousands of innocent Long Beach Federal savings depositors.

But appellants' price for saving some Long Beach Federal depositors from being "penalized" by appellants was Long Beach Federal's consent to illegal forfeitures of thousands of other savings depositors, as disclosed by the balance of Attorney Dooley's letter.

Appellees refused to agree to "penalize" their fellow depositors. Appellants therefore forfeited all pledged or assigned deposits regardless of size.

In C. I. R. v. Wilshire Holding Corporation, 288 F. 2d 799, (CA-9, 1961), this Court said at page 800:

" . . . In the conduct of a case, we think that the government must accept the consequences of what its attorneys do."

QUESTIONS

1. Is it breach of trust as appellants contend for officers of appellee Long Beach Federal to accept new savings deposits of \$42,000,000 used to partially rehabilitate the failing savings association after it had been wrecked by a \$69,000,000 run of savings withdrawals caused by appellants ^{29/} seizures and efforts to destroy the association?

2. Can Appellants violate Acts of Congress and ex post facto forfeit the statutory and charter rights of thousands of new savings depositors to equal and pro rata distribution of appellee Long Beach Federal's \$9,500,000 surplus created by their \$42,000,000 of new savings deposits?

3. Were \$42,000,000 of new savings deposits a benefit in 1962 to appellee Long Beach Federal in its then precarious financial condition with only \$30,000,000 of savings deposits left after a \$69,000,000 run caused by appellants seizures and 2 years of appellants mismanagement?

^{29/} Both the 1946 and 1960 seizures were by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation and their "Supervisory Representatives, Conservators, etc." Congressional Investigating Committees investigated appellants three times or more. The 1960 Committee said:

" . . . The board's . . . action must be characterized as arbitrary and unlawful of the most reprehensible sort. . . . In preventing the conversion the board deprived the Association of a right created by . . . Congress . . . without mincing words, we may say this is a form of regulatory supervision by blackmail. . . . The Board's action was an arbitrary and unlawful exercise of power . . . "

SUMMARY OF ARGUMENT

1. Appellee Long Beach Federal in 1962 desperately needed the \$42,000,000 of new savings deposits. Its financial condition then was precarious. It had been wrecked and damaged by appellants' 1960 seizure and the resulting \$69,000,000 run of withdrawals by thousands of terrified and intimidated appellee savings depositors. The \$69,000,000 run took 70% of the \$96,000,000 total deposits. Only \$28,000,000 of savings deposits remained in 1962 when appellee Long Beach Federal was released from 2 years of seizure by appellants and the remnants of its seized assets were returned to its founding management.

2. Every dollar of the \$42,000,000 of new savings deposits were an immediate benefit to the wrecked savings association (Long Beach Federal) and to all its thousands of depositors new and old, big and small. Among the many benefits were:

a. \$3,000,000 paid by appellee Equitable for the partially restored goodwill of Long Beach Federal. Without the \$42,000,000 of new savings deposits the wrecked and almost destroyed Long Beach Federal had no goodwill. With the new deposits \$3,000,000 was paid for goodwill.

b. Another and separate \$3,000,000 of Long Beach assets were released for immediate distribution among the thousands of savings depositors instead of being impounded for 10 years. The 10-year impound of \$3,000,000 had been

required by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation to indemnify them against their liability to the thousands of depositors, borrowers and customers of appellee Long Beach Federal for said appellants' own wrongs inflicted during their 2 years of seizure and mismanagement of appellee Long Beach Federal. After \$42,000,000 of new savings deposits came in to Long Beach Federal, appellee Equitable was willing to merge with Long Beach and assume such liabilities. Thus the impounded \$3,000,000 was released for immediate distribution instead of being held for 10 years.

c. About \$3,884,000 of income tax savings resulted from the \$42,000,000 of new savings deposits. Every dollar of new deposits created a 12% tax shelter. Under 26 U.S.C. §593 appellee Long Beach Federal got a \$5,000,000 tax shelter for the year 1962 from the \$42,000,000 of new savings deposits. The new tax shelter helped to protect from taxes the more than \$5,000,000 settlement of damages received in 1962 by appellee Long Beach Federal from appellants for their wrongful seizure and wrecking of appellee Long Beach Federal. Without these, the \$42,000,000 of new savings deposits and said benefits, only about \$842,000 could have been distributed; with the new deposits about \$9,500,000 was distributed.

3. It was not "a breach of fiduciary duty" for Long Beach Federal to accept the new savings deposits so urgently needed to save the association from ruin and extinction. The total

distribution to all savings depositors new and old, big and small was increased more than ten times by the new deposits.

The individual distribution to each and every savings depositor was increased by about four times. \$842,000 divided among \$30,000,000 of savings deposits is about 3%. \$9,500,000 divided among \$72,000,000 (\$30,000,000 of "old" deposits plus the \$42,000,000 of "new" deposits) is 13%. 13% is four times greater than 3%.

4. Appellants claim that the "new" big deposits "diluted" the old small deposits is false and sham.

5. Appellants ex post facto forfeitures of the thousands of new savings depositors statutory and charter rights to equal and pro rata distribution of the \$9,500,000 distribution they created is illegal, arbitrary and void. It violates the Acts of Congress which expressly require equal and pro rata distribution in exact proportion to each savings account balance.

6. Appellants illegal ex post facto forfeitures were promulgated almost a year after the forfeited savings deposits were made.

7. Appellants illegal punitive and ex post facto forfeitures of thousands of appellees' savings deposits is part of the 20 years of vendetta of appellants against appellees.

Twice appellants have seized and wrecked appellee Long Beach Federal (1946-48 and 1960-62). Twice appellants have been compelled by court judgments and Congressional Investigations to return the remnants of the wrecked and damaged savings

association (Long Beach Federal) to exactly the same management from which they had seized it.

A third seizure was threatened and prevented only by a Federal Court injunction.

8. Appellants smarting under the \$5,000,000 of damages they were compelled to pay appellee Long Beach Federal have wrongfully and illegally penalized and forfeited new savings deposits made with Long Beach Federal which has survived appellants 20 years of ". . . arbitrary and unlawful exercise of power . . . action of the most reprehensible sort" and "supervision by blackmail." (See page 42-44 hereof for Congressional Investigating Committee use of these terms to describe appellants.)

ARGUMENT

I.

APPELLANTS' ILLEGAL AND ARBITRARY FORFEITURES AND PENALTIES AGAINST THOUSANDS OF SMALL MUTUAL SAVINGS DEPOSITORS VIOLATE ACTS OF CONGRESS.

For more than 30 years it has been settled law in this Ninth Circuit Court of Appeals (and by the United States Supreme Court) that any administrative order or regulation is a nullity if in conflict with, or contrary to, an Act of Congress.

There are a multitude of Ninth Circuit cases so holding. Five of them are:

1. Federal Maritime Com'n. v. Anglo-Canadian Shipping Co., 335 F. 2d 255, (C.A.-9, 1964);
2. Reynolds v. United States, 286 F. 2d 433 (C.A.-9, 1960);
3. Kirk v. United States, 270 F. 2d 110 (C.A.-9, 1959);
4. Hawke v. Commissioner of Internal Revenue, 109 F. 2d 946 (C.A.-9, 1940);
5. Commissioner of Internal Revenue v. Van Vorst, 59 F. 2d 677 (C.A.-9, 1932).

In Federal Maritime Com'n. v. Anglo-Canadian Shipping Co., 335 F. 2d 255 (C.A.-9, 1964) this Court said at page 258:

" . . . regulations of an agency of the United States must be issued within the powers conferred by Congress. Kirk v. United States,

9 Cir., 270 F. 2d 110, 118. If agency regulations go beyond what Congress has authorized, they are void. Utah Power & Light Co. v. United States, 243 U. S. 389, 410, 37 S. Ct. 387, 391, 61 L. Ed. 791; Hawke v. Com'r of Int. Rev., 9 Cir., 109 F. 2d 946, 949."

In Reynolds v. United States, 286 F. 2d 433 (C.A.-9, 1960), this Court of Appeals said at page 442:

"The regulation appellant was convicted of violating was not authorized by the statute under which it was purportedly issued and was therefore invalid. It follows that the conviction of appellant thereunder is without legal authority and it must be set aside and the judgment reversed."

In Kirk v. United States, 270 F. 2d 110 (C.A.-9, 1959), this Court said at page 118:

". . . Regulations of a department must be issued within the powers conferred by Congress and must be addressed to and be reasonably adapted to the enforcement of an Act of Congress."

In Hawke v. Commissioner of Internal Revenue, 109 F. 2d 946 (C.A.-9, 1940) this Court said at page 949:

"[2] . . . Departmental regulations may not invade the field of legislation, but must be confined within the limits of congressional enactment. . . . [citing authorities]

"If the regulations go beyond what Congress can authorize or beyond what it has authorized, they are void and may be disregarded. . . . [citing authorities]"

In Commissioner of Internal Revenue v. Van Vorst, 59 F.2d 677 (C.A.-9, 1932) this Court said at page 679:

"[1] It is well settled that department regulations may not invade the field of legislation but must be confined within the

limits of congressional enactment. . . .
[citing authorities] . . . A regulation
to be valid must be reasonable and must be
consistent with law. . . ."

The United States Supreme Court has also so ruled only
last year. In Dixon v. United States, 381 U. S. 68, 14 L. ed. 2d
223 (1965) the Court said at L. ed. 2d page 228:

"[5] . . . this Court had made it clear
that 'The power of an administrative officer
or board to administer a federal statute and
to prescribe rules and regulations to that
end is not the power to make law. . . but
the power to adopt regulations to carry into
effect the will of Congress as expressed by
the statute. A regulation which does not do
this, but operates to create a rule out of
harmony with the statute, is a mere nullity.'
Manhattan General Equipment Co. v. Commissioner,
supra, 297 U. S. at 134, 80 L. ed. at 531.7. . ."

"7. See also Miller v. United States, 294
US 435, 439-440, 79 L ed 977, 980, 981, 55 S Ct
440; Lynch v. Tilden Produce Co. 265 US 315,
320-322, 68 L ed 1034, 1035, 1036, 44 S Ct 488."

The above quoted 1965 language of the United States
Supreme Court appears in the opinion of the U. S. Trial Judge
Peirson M. Hall, in 233 F. Supp. 578 (Appx. I-a hereof). In
commenting thereon Judge Hall says at page 592:

"[22] . . . it is a proposition well
established in the law that such regulations
or rules or other action of the Board cannot
be contrary to the Statute, or in excess of
the powers granted by the Statute. As stated
by the Supreme Court. . . ." [quoting the
above language].

In Helvering v. Sabine Transp. Co., 318 U. S. 306, 87
L. ed. 773, (1943) the U. S. Supreme Court said at U. S. page 311,

L. ed. 776:

" . . . We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms, and amount to an attempt to legislate. They cannot prevail . . ."

Appellants forfeitures cannot prevail unless this Court reverses the five Ninth Circuit Court of Appeals cases above quoted, plus the U. S. Supreme Court decision of May 1965, and also repeals the Act of Congress, part of which reads:

" . . . in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits." . . . (Emphasis added).

(12 U. S. C. 1464 (1); 233 F. Supp. 578 at 592.)

Conversion of Appellee Long Beach Federal from a Federal to a California state association is authorized by Congress without any need for consent of Appellants Bank Board et. al. and without any penalties or forfeitures.

In June of 1960 the Special Subcommittee On The Home Loan Bank Board, Committee On Government Operations, of the 86th Congress, conducted more than a month's investigation of appellants' 1960 seizure of Long Beach Federal. The Congressional investigating committee called before it the Bank Board Chairman, Members, General Counsel, Director of Supervision, etc. The Congressional Committee's report reads in part at page 8:

"NATURE OF THE EMERGENCY

"Did an emergency exist? If it did not,

the Board's case falls to the ground and its actions must be characterized as arbitrary and unlawful and of the most reprehensible sort. We so characterize the Board's actions. . . . there was overwhelming evidence that no emergency existed."

At page 12:

"THE CONVERSION ISSUE

"If there can be said to be an emergency which prompted the Board to seize Long Beach Federal, it was not related to the financial or business affairs of the association but to its desire and plan to convert from a Federal to a State-chartered association.⁷ This kind of emergency, we may note, has no sanction in law as a basis for summary seizure."

"7. Conversion is permitted by a law enacted in the 80th Cong., now being sec. 5 (i) of the Home Owners Loan Act of 1933 as amended." [12 U.S.C. §1464 (i) quoted above.]

At page 14:

" . . . by preventing the conversion move, the Board deprived the association of a right created by the (80th) Congress in 1948 (62 Stat. 1239)."

At page 15:

"Without mincing words, we may say this is a form of regulatory supervision by back-mail. . . ."

And at page 19:

" . . . the Board's action was an arbitrary and unlawful exercise of power."

(The full 25 page committee report is separately bound as Appendix III hereof)

This Court on a prior appeal in this same litigation took judicial notice and knowledge of such Congressional proceedings, testimony, and committee report in Federal Home Loan Bank Bd. v. Long Beach Federal S. & L. Ass'n., 295 F. 2d 403 at p. 410 (C.A.-9, 1961) and then held appellants Bank Board, et al. had violated the Administrative Procedure Act.

Appellants Bank Board by forfeiting thousands of appellee Long Beach Federal's new savings depositors is continuing its policies labeled by the Congressional Committee as "an arbitrary and unlawful exercise of power" and "regulatory supervision by blackmail". 30/

30/ See page 42-44 hereof for discussion of Congressional Committee Investigations and reports of appellants.

II.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS ARE REQUIRED BY CONGRESS TO BE "MUTUAL" ASSOCIATIONS.

Title 12 U. S. Code §1464 (a) gave the Federal Home Loan Bank Board the power to create Federal Savings and Loan Associations. It reads:

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of Associations to be known as 'Federal Savings and Loan Association,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Emphasis Added)

Over thirty years ago the then Federal Home Loan Bank Board acting under this authority prescribed a form of charter for all Federal Savings and Loan Associations throughout the United States.

On July 10, 1937, Long Beach Federal Savings and Loan Association obtained its present charter. It had been organized in 1934 under a similar charter. Congress had required that Federal Savings and Loan Associations be "mutual" and pursuant to this Congressional requirement, the terms and language of the charter prescribed and issued by the then Bank Board to Long Beach Federal Savings and Loan Association was and yet remains "mutual".

It provided in paragraph 9 of the Charter:

"9. . . . All holders of share accounts shall participate equally in dividends pro rata to the participation value of their share accounts; . . . All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." (Emphasis added)

All charters of all 2000 Federal Savings and Loan Associations, both Charter N and Charter K, yet contain similar provisions.

The U. S. Supreme Court has on several occasions considered the nature of the relationship under such charters between a federal savings and loan association and its shareholders. The Court has held that for all practical purposes, such shareholders have identical rights with depositors in mutual savings banks.

In Society for Sav. vs. Bowers, and the companion case of First Federal Savings and Loan Association of Warren vs. Bowers, 99 L. ed. 950, 349 U. S. 143, the Supreme Court was considering the rights of the State of Ohio to tax the mutual savings banks and the federal savings and loan associations in Ohio. The U. S. Supreme Court said at U. S. page 144-145, L. ed. page 956:

"Society for Savings in the City of Cleveland and First Federal Savings and Loan Association of Warren,³ two mutual savings banks having no capital stock or shareholders, and located in Ohio, attack the validity of an Ohio property tax, . . ."

"3. Society for Savings was incorporated under Ohio law, and First Federal under the Home Owners' Loan Act of 1933, as amended, 48 Stat 128, 12 USC §§1461 et seq. Nothing turns here on the difference in their origins."

Further at page U. S. 149-150, L. ed. 959 the Supreme Court said:

". . . The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, . . ."

The merger of Long Beach Federal into Equitable was because of the \$42,000,000 of new deposits, such was a "solvent liquidation of Long Beach Federal." It was "conversion by merger".

In Porter v. Aetna Cas. & S. Co., 8 L. ed. 2d 407, (1962) the U. S. Supreme Court considered the matter of Federal Savings and Loan deposits. In a separate opinion Mr. Justice Douglas said at L. ed. pages 410-411:

"SEPARATE OPINION

"Mr. Justice Douglas.

"By the standards announced in the earlier decisions share accounts in federal savings and loan associations are 'investments.' See Wisconsin Bankers Asso. v. Robertson, -- App DC --, 294 F. 2d 714. They can be

withdrawn only after 30 days' notice. The owner of a share account is a voting member of the association which, as the Court of Appeals noted, makes him 'more nearly comparable to a stockholder of a bank than one of its depositors.' -- App DC --, 296 F. 2d 389, 392. Moreover, the Home Owners' Loan Act, under which this federal association was created, makes clear that its purpose is 'to provide local mutual thrift institutions in which people may invest their funds.' 12 USC §1464 (a). (*Italics added.*) Its capital¹ is in 'shares' (12 USC §1464 (b)) such as are involved here. The holders of savings accounts who apply for a withdrawal of funds do not thereby become 'creditors.'²

"1. 'Capital' means 'the aggregate of the payments on savings accounts,' plus earnings, less deductions. See 12 CFR §541.3. 'Savings account,' such as we have here, is 'the monetary interest of the holder' in the 'capital' of the association. Id., §541.4. The account book evidences 'the ownership of the account and the interest of the holder thereof in the capital' of the association. 12 CFR §545.2 (b).

"2. 'Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.' 12 CFR §544.1 (a) par 6."

The validity of the mutual charters issued by the Federal Home Loan Bank Board to federal savings and loan associations has been upheld by the federal appellate courts.

In Wisconsin Bankers Association v. Robertson,

(a) 190 Fed. Supp. 90 (DC-D.C. 1960);

(b) 294 Fed. 2d. 714 (CA-D.C. 1961);

(c) Certiorari denied 7 L. ed. 2d 338; 368 U. S. 938.

The United States District Court said in 190 Fed. Supp.

at page 94:

" . . . the regulations and charter changes promulgated by the defendants are within their statutory authority and are authorized and legal. . . . "

The U. S. Court of Appeals for the District of Columbia affirmed the District Court and said in 294 Fed. 2d at page 717:

"The mere statement of the regulations and charter provisions referred to in the preceding paragraph refutes the allegation of illegality with respect to them, particularly in view of the fact that we hold valid the regulations which define 'capital' and 'savings account.' All the challenged provisions seem to us to be consistent with the statute, and to have been validly promulgated thereunder. As the District Court so held, its judgment will not be disturbed."

In Huntington v. Nat. Savings Bank, 96 US 388, 24 L. ed 777 (1878) the U. S. Supreme Court was deciding the rights and liabilities of depositors in a mutual savings bank. The Supreme Court said at L. ed pages 778-779:

"[such interests] . . . can be determined only after a careful examination of the defendant's charter. The Corporation was created by an Act of Congress, . . .

"The object of the institution was declared in the 4th section. By that it was enacted that 'The Corporation may receive on deposit, for the use and benefit of the depositors, all sums of money offered for that purpose,' and invest the same in the manner therein described. The section then added: 'The income or interest of all deposits shall be divided among the depositors, or their legal representatives, according to the terms of interest stipulated.'

" . . .

" . . . A corporation created by statute can exercise no powers and has no rights except such as are expressly given or necessarily implied. . . . But the charter, when conferring the power to receive money on deposit, limits it to receiving for 'the use and benefit of the depositors,' and directs how it may be invested. It further declares that 'The income or interest of all deposits shall be divided among the depositors or their legal representatives,' . . ." (Emphasis by U. S. Supreme Court.)

Until 1933 there were no federal savings and loan associations. They were created pursuant to the act of Congress passed in June 1933, as sections 5 and 6 of the Homeowners' Loan Act of 1933. (12 U.S.C. 1464 (a)).

That they were to be mutual associations is demonstrated by the history of this legislation and the rules and regulations of the Federal Home Loan Bank Board thereunder as set forth by the then General Counsel of the Federal Home Loan Bank Board, Horace Russell, in his book "Savings and Loan Associations" published in 1956. From 1932 to 1938 he was General Counsel of the Federal Home Loan Bank Board. He is the author of the charters of all Federal Savings and Loan Associations created during that period of time [Appellee Long Beach Federal was created in 1934]. He was also the author of the Federal Home Loan Bank Board regulations creating federal savings and loan associations as mutual associations.

Chapter 7 of his book is titled "The Federal Savings and Loan System". In it the former General Counsel for the Bank Board

says in part at page 61-63:

" . . . I had become convinced that the mutual savings banks were the best example of thrift institutions ever developed anywhere. . . . I saw no reason why we could not authorize Federal Savings and Loan Associations and provide the simplest possible form of a mutual savings institution and use the same primarily for sound and economic home finance.

"It was with this background that the legislation was drafted in April, 1933, and finally enacted June 13, 1933, as Section 5 and 6 of Home Owners Loan Act of 1933.

" . . . In the midst of the utmost pressure as General Counsel of the Federal Home Loan Bank System, . . . I drafted proposed rules and regulations, including a charter and by-laws, and all of the essential forms, to organize and operate an association. . . .

" . . .

" . . . During the approximately six-year period that I was General Counsel of the Board, I sat with the Board at all times it was in session. . . . There had been a few inquiries about Federal Savings and Loan Associations, most of which I think were referred to me. I laid this fifty-page draft on the Board table, with a clean copy for each Board member, and suggested that it appeared to be our duty to proceed with the associations and that there might be some criticism from Congress or the Administration unless we did proceed promptly. About one week later, I brought the question up again and the entire program was adopted as drafted." (Emphasis added)

In Intermountain Building & Loan Ass'n. v. Gallegos, 78 F. 2d 972 (CA-9, 1935) (Certiorari denied 80 L. ed. 454, 296 U. S. 639), our Ninth Circuit Court of Appeals was considering the status of various members of a savings and loan association. The Court of Appeals said at page 980:

"It is fundamental that a building and loan association may not issue preferred stock. In 4 R. C. L. 350, we find the following language: 'The pledge of the assets of a building association for the retirement of a certain class of its stock, in preference to others, is so violative of the elementary requirements of equality and mutuality as to be absolutely void.'"

Yet a preference is exactly what appellants are requiring. A preference of all mutual savings investors in Long Beach Federal who have less than \$10,000 in their respective accounts, or who have not pledged or assigned their accounts for a debt. They are to be preferred over all other mutual savings investors who happened to have, more than \$10,000 in their respective accounts, or who have pledged or assigned their accounts as security for any debt.

Those with less than \$10,000 and who have not pledged or assigned their accounts, are to receive their full charter rights, i.e., their pro rata share in the distribution of earnings, surplus, undivided profits, and reserves. They are also to receive in addition to their own share, the shares and charter rights of all other mutual savings investors whose accounts exceed \$10,000 each, or who have pledged or assigned their accounts for any debt.

Thus accounts of \$10,000 or over, or which are pledged or assigned, are to forfeit their charter rights to their pro rata distribution of the earnings, surplus, undivided profits and reserves.

The use of the word "mutual" in regard to a savings association compels equality and pro rata distribution.

In Pacific Coast Sav. Soc. v. Sturdevant, 165 Cal. 687, (1913), the California Supreme Court said at page 692:

"The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements, and all rules and by-laws, must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared--that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted on a basis of strict mutuality, equality, and fairness. To permit one member, or one set of members, to be paid in full at the expense of others who get less is not to carry out that scheme or agreement, . . . ' . . . The basis of the distribution, in such cases, is not the rule of the association expressed in its by-laws, standing alone, but the supreme rule of equality and mutuality, and the controlling inquiry is the amount paid in by the member, not the date of the issue of his stock nor that of its maturity or of any notice to withdraw.'" (Emphasis added)

There can be no valid discrimination in favor of one and against another mutual depositor in a mutual Federal savings and loan association.

In Wood v. Hamaguchi, 207 Cal. 79 (1929), the California Supreme Court was considering the rights and liabilities of stock holders in a California bank. The California Supreme Court said at page 85:

" . . . The Constitution knows no distinction

between persons, and the legislature cannot discriminate or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation; that is to say, it must operate equally on all persons and upon all things upon which it acts at all.

"Where, under the Constitution, a law must impose some indeterminate liability upon a class of persons, as, for example stockholders of a corporation, it must impose the liability, at whatever rate it may be fixed, upon all alike, and cannot exempt one any more than it can exempt all; nor can it attach a lower rate of liability to the stockholders of one corporation than it does to the stockholders of another."

III.

ANY UNEQUAL DISTRIBUTION AMONG MUTUAL SAVINGS
DEPOSITORS PREFERRING ONE AND EXCLUDING OTHERS,
VIOLATES THE ACT OF CONGRESS AND IS VOID.

By 12 U. S. C. 1464 (a), Congress required all Federal savings and loan associations to be mutual. Equality is the essence of every mutual association. The moment one group of depositors is favored and all others are excluded, the association is no longer a mutual association.

Defendant Bank Board "approves" distribution only to Long Beach Federal depositors whose accounts are under \$10,000 each and which are unassigned and unpledged. The Board excludes all other depositors. This requires an unequal and preferential distribution.

The depositors preferred by the Board take all. They take their own equal share plus the shares of the depositors excluded by the Board. The excluded depositors take nothing. Such preference destroys equality and mutuality.

Defendant Bank Board claims its power to take the property of one group of depositors and give it to another flows from Bank Board regulation 12 C. F. R. 546.4 which reads in part:

"§546.4 Voluntary dissolution.

" . . . If it appears to the Board that dissolution is advisable and that the plan of dissolution submitted is in the interest of all concerned, the Board will approve the plan; if the plan submitted appears to be inadvisable,

the Board will either make recommendations to the association concerning the plan or disapprove it. . . ."

12 U. S. C. 1464 (a) gives the Board power to prescribe regulations.

But such power does not extend to repealing the Act of Congress.

Congress says Federal savings associations must be mutual with all depositors sharing equally. The Board says Long Beach Federal depositors must be unequal, with those the Board favors taking all and those the Board dislikes taking nothing.

Thus the Board violates and repeals the Act of Congress. If this regulation is valid the Board and not the Act of Congress decides whether any Federal savings and loan is, or is not, a mutual association.

There are over 2,000 Federal savings and loan associations with many billions of assets. The Board may today permit one association in Chicago to remain a mutual with all depositors sharing equally. Tomorrow the Board may order another association in New York to distribute its assets only to savings accounts of \$100 or \$10, or less.

If the Board can thus pick and choose which mutual savings depositors share in their Association's assets and which lose everything, the whims of the Board are substituted for the Act of Congress and the United States Constitution.

The individual ownership of every savings depositor in the assets of his mutual Federal savings association will then depend, not upon the Association's charter or Act of Congress, but

upon the caprice and pleasure of the Board.

This is demonstrated in our Long Beach Federal case. From July 1962 to April 1963 the Board insisted that only Long Beach depositors whose accounts were over \$100,000 each must lose their share of the Long Beach Federal surplus [233 F. Supp. 578 at 585] [Pls. Exh. 21-41 page 6].

When the Association refused to yield to this unlawful exaction the Board required all accounts over \$10,000 each to lose their charter rights and also discriminated against all savings accounts pledged or assigned, regardless of size.

See Section I page 39-44 hereof for decisions of this Court holding regulations are void if in conflict with Acts of Congress.

IV.

ANY PREFERENCE OF ONE CLASS OF SAVINGS DEPOSITORS
(SHAREHOLDERS) OVER ANOTHER MUST BE PLAINLY
STATED IN THE PASSBOOKS GIVEN TO THE SHAREHOLDERS

The Bank Board has for many years required by regulations enacted by the Board, having the force and effect of law, that any preference of any one group or class of savings investors over any other group or class in the same institution, must be clearly set forth "in easily read type" so that all savings investors may know, at the time they make their investment, which are the classes to be preferred or discriminated against, and the basis, extent, and type of such preference or discrimination.

Code of Federal Regulations, Title 12, Section 563.3 reads in part:

"§563.3 . . . Every share, membership, or deposit certificate, passbook, or other instrument evidencing a withdrawable investment hereafter issued by an insured institution, which pays or proposes to pay a different rate of dividends or interest upon different classes of shares or securities, which prefers, or proposes to prefer, either as to time or amount of participation in earnings or assets (except by way of a bonus plan), any one or more classes of shares or securities, . . . must, unless the Corporation specifically permits omission of one or more of such recitals, include in its provisions, and display in easily read type, a full and understandable statement of the method. . . . or the dividend provisions, or both, under which the institution operates, and the charge or charges, if any, for the privilege of becoming, remaining, or ceasing to be a saver or investor in the institution." (Emphasis added).

Certainly if savings accounts of less than \$10,000 each, which are not pledged or assigned, are to receive more of the Association's surplus than other accounts of more than \$10,000 each, or which are pledged or assigned, and are to receive none of the surplus, thereby a preference is created.

Such preference to be valid must have been "displayed in easily read type" (12 C. F. R. 563.3) in the passbooks of the savings investors against whom such preference of about \$2,500,000 is to be inflicted. This was never done. It could not be done because the Bank Board did not attempt such preference until long after all the thousands of savings passbooks affected had been issued and the money deposited. The regulation was never repealed or amended. ^{31/} It was simply ignored.

These regulations have the force and effect of law and are binding upon the Bank Board as well as all savings depositors of insured savings associations, state and federal.

In Service v. Dulles, 354 U. S. 363, 1 L. ed. 1403, U. S. Supreme Court - 1957, the Secretary of State ignored his own regulations and discharged an officer of the State Department in violation of said regulations. The U. S. Supreme Court reversed and said at U. S. page 388, L. Ed. page 1418:

" . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited

31/

See page 75-76 hereof for details of how appellants own employees issued thousands of such passbooks to Long Beach Federal depositors for years during the 2 seizures 1946-48 and 1960-62.

from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them. . . ." (emphasis added.)

In United States v. Shaughnessy, 347 U. S. 260, 98 L. ed 681, U. S. Supreme Court - 1953, the Attorney General of the United States made an order for deportation of an alien in violation of his own regulations. The U. S. Supreme Court reversed and said at U. S. page 267, L. ed. page 686:

" . . . In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

APPELLANTS SWORE TO CONGRESS THAT ALL SAVINGS
DEPOSITORS BIG AND SMALL, OLD AND NEW ARE
TREATED ALIKE

On May 7th, 1963, Appellant Bank Board Chairman and all members of the appellant Board together with their legal counsel were again before the Congressional Committee. Board's then Chairman McMurray testified:

"Mr. WILSON. Mr. Chairman, thank you.

"Mr. McMurray, is there a financial limit of any sort on the size of an account that would be accepted by the Federal Savings and Loan Association?

"Mr. McMURRAY. No, sir.

"Mr. WILSON. If a customer, for example, deposited \$100,000 with a Federal savings and loan association, he would be entitled to the same dividends, rate of interest, any other benefits as the hundred-dollar depositor?

"Mr. McMURRAY. Yes, sir. Of course there might be problems. Some institutions, I know, themselves, limit the size or the conditions under which they would accept it because, if it is a small institution, a sudden withdrawal of a sizable account could create some problems for it.

"Mr. WILSON. This would be a policy of the association?

"Mr. McMURRAY. That is correct.

"Mr. WILSON. The only difference, then, really, between the large depositor and the small depositor, the one under \$10,000, would be that the large depositor doesn't have insurance above the \$10,000?

"Mr. McMURRAY. That is correct. He would have, in effect, only 10 percent of his account insured. Although, as I pointed out, as a practical matter, up to now anyway, we have, in effect, taken care of all the accounts, no matter what the size.

"Mr. WILSON. Can the Home Loan Bank Board require different treatment for different size depositors in an association?

"Mr. McMURRAY. Not that I know of, sir.

"Mr. WILSON. You cannot tell them to treat those who are insured or those who are considered small depositors any different from those who are large depositors?

"Mr. McMURRAY. No, sir. They are treated exactly the same.

" . . .

"Mr. WILSON. I am interested. We have a well-known case in southern California that has come to my attention on many occasions. That is the *Long Beach Federal Savings and Loan* case.

"Mr. McMURRAY. Yes, sir, I am very familiar with it, sir."

[Pls. Exh. "22" pgs. 30-31]

Bank Board Chairman McMurray also testified on January 24, 1963, before a different Committee of Congress. The Independent Offices Appropriations for 1964, Hearings Before a Subcommittee of The Committee on Appropriations, House of Representatives, Eighty-Eighth Congress, Government Printing Office's printed transcript cover page and pages 245, 247, 250 and 251 [3R-1293-1297(Exh. A)].

Bank Board Chairman McMurray, at that time testified in part at page 250 and 251:

"Mr. Thomas. Your Federals are all mutuals?

"Mr. McMurray. Yes, sir.

" . . .

"Mr. Thomas. . . .

"If you were to dissolve the System tomorrow, where do the assets go?

"Mr. McMurray. To whom would they go?

"Mr. Thomas. Yes.

"Mr. McMurray. In a mutual association to the shareholders.

"Mr. Thomas. Each individual depositor would share in them?

"Mr. McMurray. Yes, sir.

"Mr. Thomas. How would you divide that profit? Is there any profit stored up or is it a paper profit?

"Mr. McMurray. There are also reserves, sir.

"Mr. Thomas. How do you figure out the reserves? Here is a man who has been a depositor say of a thousand dollars for 10 years. One has been a depositor for 20 years of a thousand dollars. One is a depositor of the same amount of money for

a year. Would you figure it out on the basis of time? How would that distribution be made?

"Mr. McMurray. Actually, the way you would have to figure it out is every shareholder is equal to each other in terms of the share that they have of the reserves.

"Mr. Thomas. That is the point. What share of the reserves does that individual have? He has been in the System with the same amount of money, 10 years, 20 years, and 1 year.

"Mr. McMurray. It would be the same. The idea is these mutual associations will live forever and they serve a perpetual need in the community. This, of course, raises some questions about the conversion from a mutual to a stock association where the present shareholders 'divvy' the surplus and the past shareholders do not. That is why some people I have heard argue against the right of associations to convert into stock companies because someone gets something for free." (Emphasis added.) [3R 1290-1291]

(But Congress said they must all share alike 12 U. S. C. 1464 (i) quoted on page 42 hereof.)

This and other similar testimony by the same Bank Board Chairman, before other Congressional Committees provoked the comment by the U. S. Trial Court in its opinion, 233 F. Supp. 578, (Appx. I-a hereof) at page 599, footnote 4:

"Throughout the merger negotiations and since these suits were filed, the position of the Bank Board is precisely contrary to the public statements of Professor McMurray as Chairman of the Board (now resigned) which reflected an almost trapezical agility to shift, depending on whether or not he was talking to a Congressional Committee, to the public, or to Long Beach Federal. Professor McMurray testified that all Federal mutual depositors share alike on dissolution, whether they have been in the system one year, ten years, or 20 years, when he appeared before the House Committee on Appropriations on January 24, 1963. And on May 7,

1963, he testified before the House Committee on Banking and Currency that all depositors in Federal mutuals were treated alike, whether \$100.00 or \$100,000.00, and whether pledged or not; and in a public speech in New Orleans on March 2, 1964, he again emphasized the necessity for equality of treatment in Federal mutuals."

At the very time of such testimony, about \$19,000,000 of Long Beach Federal's savings deposits were being partially forfeited and penalized by appellants.

In May 1963, the Board was directed to report in writing to the Congressional Committee what it was doing about the Long Beach - Equitable merger. [Pls. Exh. "22" pg. 38]

Only then did the Bank Board agree that Article VII of the merger agreement could include the language:

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein."

From July of 1962 until April of 1963 the Bank Board sought to exclude only savings deposits that exceeded \$100,000 each. No effort was made to forfeit the surplus of those under \$100,000 or those who pledged or assigned their savings accounts. [Pls. Exh. 21-41 pg. 6]. But when Long Beach Federal refused to violate its charter and the Settlement Agreement which both require equal and pro rata distribution of surplus in proportion to the balances of all savings accounts regardless of size, the Bank Board leveled its blunder-buss. It aimed at the mass of 30,000 accounts of 60,000 innocent savings depositors. It forfeited all

accounts over \$10,000 to the extent they exceeded \$10,000 per account. It also forfeited all accounts regardless of size pledged or assigned to secure any debt.

When Long Beach Federal's founding management and the Shareholders' Protective Committee yet refused to sell out one group of shareholders to save others, appellant Bank Board fired its double barreled blunderbuss. It well knew that the random and scattering blasts would strike some and miss others; would wipe out \$500 and \$1,000 savings account holders and transfer their shares of Long Beach Federal's surplus to the up to \$10,000 and multiple account holders.

When the Bank Board pulled the trigger it had before it the individual savings records of every savings depositor who had pledged or assigned his savings account. It also had before it the individual savings records of every savings account of \$10,000 or more. [Pls. Exh. 21-62A page 4] If there were any "pickpockets" among these thousands of innocent savings depositors the Bank Board could every easily have singled them out. [Pls. Exh. 21-62A pg. 4]

Long Beach Federal repeatedly had offered to deposit in court the share of Long Beach Federal's surplus belonging to anyone or more savings depositors which the Bank Board named and accused of any fraud, wrong, or violation of law. [Pls. Exh. 21-16 pg. 4]

This appellant Bank Board repeatedly refused to do. It well knew there was no wrong done and no law violated. Hence no

findings, or even accusations, of any wrong or crime were made by appellants.

So, instead of letting Long Beach Federal or its shareholders go to court on the 54 accounts of over \$100,000 each the Bank Board deliberately and knowingly fired its blunderbuss into the crowd to maim and forfeit, to confuse and stampede. Perhaps another run could be started as in 1946 and in 1960.

But the Bank Board again misjudged the Long Beach savings depositors. They had rallied after the 1946 seizure and the \$10,000,000 run and again after the 1960 seizure and its \$69,000,000 run.

They had seen both State and Federal Courts hold joint sessions in their seized savings association in 1962 to oust the Bank Board's "Supervisory Representatives in Charge". Congress was also quick to answer their cries for help.

The Long Beach shareholders refused to victimize each other. Those left standing refused to take the forfeited shares of their fellow depositors laid low by the Bank Board's blunderbuss. Instead they united and voted 99.4% to complete the merger and then go to court for distribution of the \$9,500,000^{32/} available from the merger. [Pls. Exh. 12/9/63-6 pg. 3; 12/9/63-8 & 7-A-4-5] The entire surplus was put in court for the court to divide equally and pro rata or as the court might decide. And the Long Beach depositors knew it might take another 20 years more of

court litigation to "do it again".

But this time trial court justice was swift. Orders to show cause were issued in 1963 by both State and Federal Courts to the Bank Board [3R 119-124]. The Federal Court also required a copy of the class action complaint to be mailed to all shareholders and to be published in local daily and other newspapers. [1R 122-126 & 3R 297-299; 2R 154-170 & 3R 350-406; 3R 180-214 & 3R 298-311]. Any savings depositor who wanted to take for himself some other depositors pro rata share, as the Bank Board ordered, had every opportunity to do so.

None did. Only one appeared and claimed (for less than \$200) but he later dropped out. [233 F. Supp. 578 at 591]

Now the Bank Board again faces the same Federal Appellate Court it has faced since 1946. The same court it told in 1960 that "current conditions" were to govern the life or death of the then seized Federal savings association. "Current conditions" in 1960 were a solvent, prosperous and growing savings association (Appellee Long Beach Federal) with \$96,000,000 in assets and not in debt to anyone when seized in April 1962. By September 1962, 4 months later, the seized Association had lost \$69,000,000 (over 70%) of its savings deposits in a run of withdrawals and was alleged to owe a \$47,000,000 demand debt to Federal Savings and Loan Insurance Corporation, the alter ego of the seizing Bank Board.

With only \$28,000,000 of savings deposits left and \$47,000,000 in debt, the Association's doom appeared to be certain.

But neither the United States District Court nor this United States Court of Appeals for the Ninth Circuit would permit such injustice. The Trial Court said in Long Beach Federal v. Federal Home Loan Bank Board, 189 F. Supp. 589, (1961) at pages 603-604:

" . . . While the Supervisory Representative has been in charge and possession of the Association, deposits of the Association were withdrawn in the sum of approximately 60 million dollars between April 22, 1960, when its deposits were approximately 95 million dollars, and July 31, 1960, when its deposits had dropped to approximately 35 million. To limit the hearing to whether or not grounds 'currently' exist for the appointment of a conservator would make a dead letter of the provisions of Section 503 (d) (1) of the Housing Act of 1954 relating to the appointment of a conservator, and would press dangerously close to a denial of due process. April 22, 1960 was the last date the Association had possession and control of their property and records, and the last it or its management can be held responsible for any of the things charged in either Order No. 13,372 or Order No. 13,440. Neither it nor its officers can be held responsible for what the Supervisory Representative in Charge, acting under the control of the accusing Board during that period, has done since.

" . . .

"To hold that only the current condition of the affairs of the Association can be inquired into under Order No. 13,440 without examining whether grounds existed for the appointment of a conservator on April 19, 1960, would be similar to executing a judgment on the filing of a complaint, and then limiting the trial to whether or not the defendant had any property at the time of trial. It is like trying to 'unring a bell'. The illustration may seem harsh, but it is apposite, and illustrates the unsoundness of Respondents' objection above-mentioned, not only as being contrary to the Act, but fraught, as well, with violation of due process."

And this United States Court of Appeals for the Ninth Circuit said

in Federal Home Loan Bank Board vs. Long Beach Federal, 295 F. 2d 403, (1961) at page 411:

" . . . (2) since the Association's ousted management cannot be held responsible for what the supervisory representative in charge has done since the seizure on April 22, 1960, the question of whether a conservator should be appointed, which is the prime issue in the administrative proceedings under Resolution No. 13,440, is to be determined with reference to the facts as they existed prior to the seizure effectuated on April 22, 1960, when the supervisory representative in charge took possession and control of the premises, assets and property of the Association."

The Congressional Investigating Committee found as to the damages inflicted by appellants in the first six weeks of the two year 1960-1962 seizure of appellee:

" . . . All parties understood that the appointment of a conservator or receiver is a drastic and extraordinary action, to be used only as a last resort. Obviously they knew that the mere fact of the appointment, when announced, and by the manner and wording of the announcement, creates uncertainty and panic among depositors. Inevitably there is a 'run' on the association, millions of dollars in deposits are hastily withdrawn, assets are depleted.

"The Board anticipated the 'run' on Long Beach Federal and prepared for it by arranging for a loan of \$30 million from the Insurance Corporation at 4 percent interest. Thus, Long Beach Federal was put in debt to the Insurance Corporation for that huge amount to handle a situation created not by its own managerial decision but by the seizure action of the Board. Chairman Robertson said it was only 'prudent' to anticipate and plan for the run.

"The local association suffers rather than improves under the management of a Federal official who is a stranger to the community, who has but a temporary and transient and

punitive-type connection with the local association, and who has no incentive or instructions to build up the association's business. In fact, the supervisory representative conducts a holding operation 'pending' -- to use the Board's phrase in its recent order -- 'further disposition of said association and its affairs.'

" . . .

"(9) A better explanation of the summary seizure action was the Board's unwillingness to permit Long Beach Federal to convert from a Federal to a State-chartered association, which conversion is permitted by law. The seizure order came on the heels of an application by Long Beach Federal to the California State authorities for conversion and a subsequent examination by State examiners, which was interrupted by the seizure action.

"(10) The Board contemplated, when it directed the seizure, that there would be a 'run' on the association by depositors, and it arranged in advance for a \$30 million loan by the Insurance Corporation to the association. At the time of the hearings, 6 weeks after seizure action, approximately \$37 million had been withdrawn from the \$96 million association.

" . . .

"(1) The Board should restore forthwith Long Beach Federal to its former management.

" . . .

"(4) In effecting the return of Long Beach Federal to its former management, the Board should utilize the financial and credit resources of the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank of San Francisco to enable the association to repair the damage done by the seizure and to regain its previous business position." (Emphasis added).

The full 25 page committee report is separately bound as Appendix III hereof.)

The \$30,000,000 loan of 1960 grew to \$47,000,000 and the \$35,000,000 run grew to \$69,000,000 of withdrawals by 1962. ^{33/}

Can there be any doubt of the desperate need of Long Beach Federal in 1962 for the tens of millions of dollars of new savings deposits it so urgently sought from every possible source? Appellee Long Beach Federal ran daily full page ads in local and other newspapers. It also broadcast over television, radio, etc., seeking millions in new savings deposits in every way. (Copies of such ads are plaintiff's exhibit 12 B) Yet, appellants would forfeit and penalize these new depositors.

A Bank Board capable of these injustices could be expected to label as "pickpockets" ^{34/} and try to forfeit those new savings depositors who came to the aid of Long Beach Federal in April 1962 when it sorely needed tens of millions of dollars of new deposits to recover from the \$69,000,000 run and seizure of 1960-1962.

^{33/} From First Report of Special Home Loan Bank Board Committee on its investigation of Federal Home Loan Bank Board seizure of Long Beach Federal Savings and Loan Association. Appendix III hereof.

^{34/} Appellants counsel at TR-122 referred to the new savings depositors as "pickpockets". He later withdrew such epithet, but it discloses the attitude of appellants and their counsel.

In Farmers v. United Electrical, etc., 211 F. 2d 36 (CA-DC, 1953), [Cert. Denied 347 U.S. 943, 98 L.ed. 1091], the N.L.R.B. denied all members of a labor union all their rights under the Labor Act. Such denial was solely because the Union's officers had not complied with a Board order. The D.C. Court of Appeals said at page 39:

" . . . To impose this penalty upon the great mass of innocent union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets."

VI.

PLEDGING A SAVINGS ACCOUNT TO SECURE A LOAN IS NO
CRIME OR WRONG. IT CANNOT BE USED AS AN EXCUSE TO
FORFEIT ANY PART OF THE PLEDGED SAVINGS ACCOUNT.

The power of the Bank Board to prevent fraud, crime or violation of any law or regulation, is unquestioned. But neither fraud, crime, or any wrong is here involved in any way. Fraud or crime are never presumed. They must be specifically alleged and proved. None of appellant Bank Board's forfeiture orders ^{35/} contain any findings (or even accusations) of any fraud or wrong. ^{36/} Nor was any proof thereof offered to the trial court. Instead forfeitures were inflicted by appellants mere fiat or whim.

It is not fraud or a crime to pledge or assign a savings account in a Federal savings and loan association. No published regulation or ruling of the Board places any penalty upon so pledging or assigning. On the contrary, pledging or assigning are specifically authorized. For about 30 years Long Beach Federal's Charter ^{37/} has read:

"13. Loans and investments.--The association may make loans to holders of share accounts on the sole security of their share accounts. To secure such loans the association shall obtain a lien

^{35/} Appellants' Orders are Plaintiff's Exhibit 3-D-4 and 3-D-5.

^{36/} See section VI-A, page 77 hereof entitled "Appellants Made No Findings Of Any Fraud, Crime or Wrongdoing By Anyone".

^{37/} Said Charter is Plaintiff's Exhibit 19.

upon, or a pledge of, the share account. . ."

This Charter form was drawn by the Bank Board and issued to Long Beach Federal on April 13, 1937. It has never since been changed.

Many Bank Board regulations provide how a savings account is to be pledged or assigned. Examples are:

12 C.F.R. 545.7 reads in part:

"§545.7 Loans on savings accounts.

"Any Federal association may make loans on the security of its savings accounts, whether or not the borrower is the owner of such account: Provided, That the association obtains a lien upon, or a pledge of such savings account as security therefor. . . ." [Emphasis added]

The form of savings passbook issued to every savings depositor is determined by appellant Bank Board. 12 C.F.R. 545.2 reads in part:

"§ 545.2 Evidence of ownership.

". . .

"(b) Account books and certificates. A Federal association that has Charter N or Charter K (rev.) shall issue to each holder of its savings accounts an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association; except as hereinafter provided, each such certificate shall be in form prescribed by the Board. (The Board has prescribed for use by all Federal associations that have Charter K, forms of certificates evidencing the ownership of savings share accounts, short-term savings share accounts, and investment share accounts; and has prescribed for use by all Federal associations that have Charter N or Charter K (rev.) forms of certificates evidencing ownership of savings accounts. Illustrative copies of these forms may be obtained from the Federal Home Loan Bank Board, Washington, D. C., or from any

Federal home loan bank.) . . .

"(c) Ownership of record. A Federal association may treat the holder of record of a savings account as the owner for all purposes without being affected by any notice to the contrary unless such Federal association has acknowledged in writing notice of a pledge of such savings account. . . . [Emphasis added]

"(d) Duplicate account books and certificates. Upon filing with a Federal association by the holder of record as shown by the books of the association, or by his legal representative, of an affidavit to the effect that the certificate or account book evidencing his savings account with the association has been lost or destroyed, and that such certificate or account book has not been pledged or assigned in whole or in part, such Federal association shall issue a new certificate or account book evidencing such savings account in the name of the holder of record:" [Emphasis added]

12 C.F.R. 561.5 reads in part:

"§561.5 Account of an insured member.

"An 'account of an insured member' is the total amount credited . . . to any member in withdrawable or repurchasable accounts, whether or not such accounts are subject to any pledge," [Emphasis added]

Every passbook issued to Long Beach Federal's 60,000
depositors contains a blank form for assignment.^{38/}

This form was supplied by appellant Bank Board to
Long Beach Federal for its use.

Thousands of these passbooks were issued in this exact
form to Long Beach Federal depositors by appellant Bank Board's

^{38/} Such form is:

"TRANSFER OF SHARE ACCOUNT AND MEMBERSHIP

"For value received the undersigned hereby
sells, assigns and transfers to _____
the share account represented by the within certifi-
cate of LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
and does hereby irrevocably constitute and appoint the
officers of said association to transfer said share
account on the books of said association.

"This ____ day of _____, 19____

"Signature* _____

"In the presence of: _____

"The undersigned is the transferee of the share
account represented by the within certificate and
has executed application for membership and signature
card.

"Signature* _____

"Transfer entered of record _____, 19____

"LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

"By _____

"*Note: Co-tenants (with right of survivorship)
are one member as a partnership is one member. One
signature is binding."

(Plaintiffs Exhibit 16)

own employees.

Supervisory Representatives in Charge Ault and Stone seized Long Beach Federal and operated it for two years (1960 to 1962). Conservator Ammann seized Long Beach Federal and operated it for another two years (1946 to 1948). All three (Ault, Stone and Ammann) for said four years took millions of dollars of savings depositors' money from thousands of savings depositors and issued to them this identical form of passbook containing this exact form for assignment.

Many of these regulations have existed 20-25 or 30 years. All were effective in 1962 when these savings accounts were pledged or assigned. Even today (1966) four years later, all these regulations remain unchanged and fully effective.

Yet appellant Federal Home Loan Bank Board by its forfeiture seeks to forfeit all pledged or assigned savings accounts regardless of size or duration.

VI-A.

APPELLANTS MADE NO FINDINGS OF ANY FRAUD,
CRIME, OR WRONGDOING BY ANYONE^{39/}

Appellant Bank Board has made 3 board orders on the Long Beach Federal-Equitable merger. They are orders No. 17177, FSLIC-1593 and No. 17374.^{40/} These orders comprise about 9 pages of single space, small type. They were made in June and September, 1963.

Thousands of pages of photocopies of savings accounts records were made by Long Beach Federal and sent appellant Bank Board. Hundreds of letters were exchanged between Board and Long Beach Federal. [Plaintiff's Exhibit "21", Defendant's Exhibit "C".]

Many conferences between Board members and Long Beach Federal officers lasted three consecutive days.

In 1963 Congress demanded and the Board gave reports on this long delay. [Plaintiff's Exhibit "22", pgs. 38-44.] The Board took over a year considering the matter. (May 1962 to June 1963.)

Yet no fraud, no wrong, no violation of any law or regulation is anywhere found or stated in any Bank Board order

^{39/} See also section IX, page 27 hereof entitled "Whatever May Be The Power Of The Board Based Upon Findings Of Fact It Cannot Forfeit Plaintiff's Savings Deposits By Mere Edict Or Fiat Issued After The Deposits Were Made".
^{40/} Plaintiff's Exhibit 3-D-4 and 5.

on this merger.

Instead the Board simply forfeits the Charter rights of all pledged or assigned savings accounts to share in the association's surplus. This forfeiture is regardless of size of the savings account. It wipes out the \$1.00 accounts as well as the \$100,000 or larger accounts.

The Bank Board pretends to "protect the small depositor". But, of the about 1,899 savings accounts forfeited by appellant Board:

(a) Over 300 or 17% are \$500 or under each;

(b) Over 1,520 or 80% are \$11,000 or under each; and

(c) Only 54 or 3% are \$100,00 or over each.

[Plaintiff's Exhibit "13"; District

Court Opinion 233 F. Supp. 578 at page 599]

The Board actually takes away the share of the poor savings depositor who must pledge or assign his savings account and gives it to the more fortunate depositor whose account remains unpledged.

By the Board's forfeiture orders, unpledged savings accounts up to \$10,000 each take their own full share of the Association's surplus; they also take the shares of all pledged or assigned accounts. Thus the small depositor who must pledge or assign his savings account to secure his debts loses his share of the surplus. It is taken from him and given to other more fortunate savings depositors who do not need to give security in

order to borrow. The small depositors only crime is that he gave his savings account as security for his debt. For this his share of the Association's surplus is taken from him and given to others -- others who may have borrowed more than he did but who did not pledge or assign their savings accounts as security.

The unfairness of this arbitrary discrimination is emphasized by the fact that several savings accounts of \$10,000 each are often held by the same family. Father may have his own \$10,000 account, mother may have her own \$10,000 account, father and mother may have their joint \$10,000 account. Any number of sons or daughters may each have their own separate \$10,000 accounts. Minor children's accounts are often held for them by their parents as guardians or trustees. This may be extended to as many separate accounts as there are members of large families. As an example:

Account Number	Name	Balance
1	John Smith	\$10,000 or less
2	Mary Smith	\$10,000 " "
3	John Smith and Mary Smith	\$10,000 " "
4	John Smith, as Trustee for Mary Smith	\$10,000 " "
5	Mary Smith, as Trustee for John Smith	\$10,000 " "
6	John Smith, as Trustee for John Smith, Jr. (His Son)	\$10,000 " "
7	Mary Smith, as Trustee for John Smith, Jr. (Her Son)	\$10,000 " "

Account Number	Name	Balance	
8	John Smith and Mary Smith, as Joint Trustees for John Smith, Jr. (Their Son)	\$10,000 or less	
9	Mary Smith, as Trustee for Mary Ann Smith (Her Daughter)	\$10,000 " "	
10	John Smith, as Trustee for Mary Ann Smith (His Daughter)	\$10,000 " "	
11	John Smith and Sam Smith (John's Father)	\$10,000 " "	
12	Mary Smith and Helen Jones (Mary's Mother)	\$10,000 " "	
Total		\$120,000	over \$10,000

The total savings accounts of one family can thus
easily exceed \$100,000.^{41/} But so long as no single account

^{41/} Such splitting of accounts into \$10,000 each is
encouraged by both Congress and the Bank Board. 12 U.S.C. §1724,
as amended by Congress in 1959 reads in part:

"SUBCHAPTER IV.--INSURANCE OF SAVINGS AND
LOAN ACCOUNTS

"§ 1724. Definitions

"As used in this subchapter--

* * * * *

"(b) The term 'insured member' means an individual, partnership, association, or corporation which holds an insured account. . . . Funds held in fiduciary capacity, when invested in an insured institution shall be insured in an amount not to exceed \$10,000 for each trust estate, and notwithstanding any other provisions of this chapter, such insurance shall be separate from and additional to that covering other investments by the owners of such trust funds or the beneficiaries of such trust estates. Notwithstanding

exceeds \$10,000, the entire \$100,000 will take its equal pro rata share of the Association's surplus. After the merger this amounted to about \$1,300 per \$10,000 account, or a total of \$13,000 for the \$100,000 family. [Plaintiff's Exhibit 12/9/63-2, 12/9/63-3]

The \$500 account holders' share was about \$65.

The \$1,000 account holders' share was about \$130.

The \$5,000 account holders' share was about \$650.

By the Bank Board's forfeiture orders the \$100,000 family gets its own \$13,000 pro rata share. It also takes:

41/ cont'd:

any other provision of law, two persons who are husband and wife shall have, with respect to accounts in an insured institution which are community property of such husband and wife and to the extent that such accounts are community property, not to exceed \$10,000 of insurance with respect to such an account or accounts in the sole name of the husband, not to exceed \$10,000 of insurance with respect to such an account or accounts in the sole name of the wife, and not to exceed \$10,000 of insurance with respect to such an account or accounts in the sole name of both: Provided, That in no event shall this sentence increase to an amount which is greater than the total of the amounts hereinbefore set forth in this sentence the aggregate of the insurance which such husband and wife may have under this sub-chapter with respect to (1) any account or accounts in such institution in the sole name of either of them or in the sole names of both, and (2) any other account or accounts in such institution to the extent that such other account or accounts would, in the absence of this sentence, be required to be included in determining the amount of the individual insurance of such husband or of such wife under subsection (a) of section 1728 of this title. As amended July 28, 1959 . . ."

NOTE: In 1966 the amounts of said insurance was increased by Congress from \$10,000 to \$15,000.

(a) All the shares of \$500 accounts (or less) \$65.00 per account;

(b) All the shares of \$1,000 accounts (or less) \$130 per account; and

(c) All the shares of \$5,000 accounts (or less) \$650 per account (and all other pledged or assigned accounts shares).

Appellants contend and appellees admit many large depositors borrowed the money from other banks to make their savings deposits in Long Beach Federal. Some, but not all of these Long Beach Federal depositors pledged or assigned their savings passbook to the bank as security for said bank loans. But others borrowed from banks to make their deposits, yet did not pledge their Long Beach savings accounts as security for their bank loans.

Under appellant Bank Board's forfeiture orders they would receive their own pro rata share of the association's surplus and also take the shares forfeited by all those who pledged or assigned.

Thus, the \$100,000 family could have borrowed all its \$100,000 from a bank, split it up into 10 Long Beach Federal savings accounts of \$10,000 each, and (so long as it did not pledge its accounts) yet receive both its own \$13,000 pro rata share of the surplus and also get the \$65 forfeited share of the \$500 savings account holder compelled by his poverty to pledge or assign his \$500 savings account as security for his debt.

There can be no possible justification for taking the \$500 savings depositors tiny \$65 share of the Association's surplus from him to add it to the \$13,000 share of the \$100,000 family who may also have borrowed all the money they deposited. Yet the Bank Board's forfeiture orders do just that.

Congress created MUTUAL Federal savings and loan associations to encourage, not penalize, savings thrift and borrowing. 12 U.S.C. §1464(a) reads:

"§1464. Federal Savings and Loan Associations -- Organization authorized

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." [Emphasis added]

Mutuality is destroyed and the act of Congress repealed by such Bank Board orders.

VII.

HAVING MORE THAN \$10,000 IN A SINGLE
SAVINGS ACCOUNT IS NO CRIME OR WRONG.

IT CANNOT BE USED AS AN EXCUSE TO
FORFEIT ANY PART OF SAID ACCOUNT

Even more shocking is the Bank Board's discrimination against savings depositors because of the size of individual savings accounts. It is neither fraud or a crime to have more than \$10,000 in a single savings account in a Federal savings association. No published regulation or ruling of the Board places any penalty upon the size of any such savings account, whether under or over \$10,000 each. ^{42/}

Yet by its forfeiture orders the Bank Board takes away the shares of Long Beach Federal's surplus from all accounts over \$10,000 each and gives the forfeited shares to all accounts of \$10,000 or less. The gross unfairness of this is made most apparent by contrast. For example, two families make savings deposits of \$100,000 each in Long Beach Federal on the same day. One splits its \$100,000 up among father and mother, sons and daughters, grandparents, etc. It opens 10 separate savings accounts of \$10,000 each with 10 separate account numbers and 10

^{42/} 31.4% or almost one-third of all the savings accounts of all the savings and loan associations throughout the United States are held in accounts of more than \$10,000 each. See page 124 hereof for details.

separate savings passbooks. Its pro rata share of Long Beach Federal's surplus after merger is \$13,000 (\$1,300 for each of the 10 accounts).

On the same day another family also makes a \$100,000 deposit. It opens only a single account for \$100,000 in the name of the father. It has a single savings passbook and only one account number. Its pro rata share of Long Beach Federal's surplus is also \$13,000. There is \$26,000 of surplus for both families. By the applicable act of Congress (12 U.S.C. 1464 (1)) and Long Beach Federal's charter each would get its pro rata \$13,000.

By both law and reason both families should be treated exactly alike and get \$13,000 each. But by the Bank Board's arbitrary forfeiture orders the split account family takes \$17,900 and the single account family takes \$1,300. The split account family gets about 13 times more than the single account family. Yet both have the same amount \$100,000 on deposit.

This absurd distribution results from the Bank Board's "formula" distribution instead of equal and pro rata statutory and charter distribution. Such is in the teeth of the applicable Act of Congress and contradictory of its plain terms which require:

" . . . in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits. . . ."
[Emphasis added]

The Bank Board orders require each unpledged and unassigned savings account to receive its pro rata share of surplus up to \$10,000 per account but no more. Thus the single account family participates for only \$10,000 of its \$100,000. It gets \$1,300 for the first \$10,000 of its account and no more. It loses \$11,700 on the excluded \$90,000 balance in its \$100,000 account.

The \$11,700 thus lost is taken from the single account family and scattered at random among all accounts under \$10,000 each.

The split account family gets its own \$13,000. It also gets about \$4,900 of the forfeited amount taken from the single account. The balance is scattered among other yet smaller accounts.

But all accounts large and small are excluded to the extent they are pledged or assigned.

VIII.

APPELLANT BANK BOARD FORFEITS SMALL DEPOSITORS INSTEAD OF PROTECTING THEM

This double barreled exclusion creates a shot gun blast which mows down the very depositors the Bank Board says it is "protecting".

As shown above the \$500 and \$1,000 depositors compelled by dire necessity to pledge or assign their tiny savings accounts to secure their debts, lose. They lose their \$65 to \$130 shares of the Association's surplus. And they lose it to other depositors who may have borrowed even more but who did not secure their debt with their savings passbooks.

Two families open identical savings accounts the same day in the same amounts, i.e. \$100,000 each. Both should receive \$13,000 each for their respective pro rata shares of the Association's surplus. The surplus was created by both families equally.

One splits its deposits into 10 separate accounts totalling \$100,000. The other makes a single deposit of \$100,000 with a single savings account.

By the Bank Board's capricious orders of distribution the split account family will get \$17,900 for its \$100,000. The single account family will get only \$1,300 for its \$100,000. One gets \$16,600 more, 13 times more than the other. Yet both deposited identical amounts on the same day.

If any distinction were to be made it should favor and

not exclude the \$100,000 single account family. The 10 accounts of \$10,000 each were each fully insured for a total of \$100,000 by appellant Federal Savings and Loan Insurance Corporation.

The single account of \$100,000 was insured for only \$10,000. \$90,000 or 90% of it was exposed to further Bank Board seizures and possible depositors runs resulting in perhaps another 20 years of court litigation. Yet, the \$100,000 single account which took these heavy risks is to get only \$1,300 and the identical \$100,000 in split accounts which were fully insured and took no risks are to get \$17,900.

13 times more for one than the other.

Why do hundreds of \$500 depositors lose their \$65 (each) share of the Association's surplus to other depositors whose shares are \$1,300 (each) or more?

Why does one savings depositor get \$17,900 and another get \$1,300 (or 13 times less) for his share of the Long Beach Federal surplus when both deposit the same amount in similar savings accounts on the same day in the same Federal savings association?

Why? Because appellant Bank Board says so. That's why. And the Bank Board says so only a year or more after the deposits are made. No published law, regulation or ruling authorizes any distribution other than equally and pro rata in proportion to the savings accounts balances. Such is in the teeth of the applicable Act of Congress and contradictory of its plain terms which require:

". . . in the event of dissolution after

conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits. . . ."
[Emphasis added]

(12 U.S.C. 1464(i); 233 F. Supp. 578 at 592, Appx. I-a hereof.)

25 years before the deposits were made the Bank Board signed Long Beach Federal's charter. It follows the Act of Congress. The charter says:

"9. . . . All holders of share accounts shall participate equally in dividends pro rata to the participation value of their share accounts; . . . All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." [Plaintiff's Exhibit "19" pg. 6]

Six weeks before the deposits were made appellant Bank Board signed the Settlement Agreement ^{43/} (February 14, 1962) with the Long Beach Federal and with the Shareholders' Protective Committee. The Settlement Agreement, Article XV also provided for distribution of Long Beach Federal's surplus equally and pro rata. It said (page 45):

"(h) After the assumption by Equitable of said aggregate principal amount of all Long Beach share accounts and after the payment or the making by Long Beach of provision for payment of all creditor and other liabilities, the net surplus, reserves and undivided profits of Long Beach shall be distributed as and when available to Long Beach shareholders . . .

"(i) Each such shareholder shall be entitled to such part of the amount of such distribution as

the dollar value in principal of his share account at the close of business on Approval Day bears to the total dollar value in principal of all Long Beach share accounts at the same time (not including said adjusting dividends in the computation) . . .

"(ii) Such distribution shall be made from time to time, . . . until the total net surplus, reserves and undivided profits and any other remaining assets of Long Beach have been collected, converted into cash and distributed according to such plan."

This was in the exact terms of both Long Beach Federal's charter and the Act of Congress 12 U.S.C. §1464(i) (see page 42 hereof for text). Any other unequal or preferential distribution violates the U. S. Constitution, the Act of Congress and Long Beach Federal's charter.

The Settlement Agreement was filed with both State and Federal Courts. By orders of both said courts, notices were published and were also mailed to all Long Beach members, including those who withdrew during the \$69,000,000 run. The notices referred to the settlement. Both State and Federal courts and a Bank Board member were in Long Beach Federal's premises on April 2, 1962 when this Settlement Agreement was approved by both courts then holding court sessions with their clerks and court reporters in Long Beach Federal's offices. [3R-1145] Long Beach Federal was then returned to its founding management. About \$24,000,000 of new deposits were made that day and the next. Within a few weeks the deposits had increased more than \$35,000,000.

But when Long Beach Federal sought to distribute its surplus according to the exact terms of the Settlement Agreement,

the Act of Congress (12 U. S.C. §1464(i)) and Long Beach Federal's charter, the Bank Board says "No". "The Act of Congress and the charter are wrong". There must be a distribution by "formula". Thousands of savings depositors must be excluded entirely. Other thousands shall take their own shares and also the shares of those excluded. Among hundreds of savings depositors who deposited the same amounts on the same day in the same savings association, some shall be preferred; others shall be excluded. Some shall receive distributions of 13 times more than others. Those favored by appellant Board shall take all. Those hated by appellant Board shall take nothing.

Appellant Bank Board fancies itself as a sort of Robin Hood, taking from the "rich" and giving to the poor. But in this also, the "Robin Hood" Board has become confused.

The "rich" from who it takes include hundreds of \$500 and \$1,000 savings account holders who pledged their tiny savings accounts to secure their small but pressing debts. Is a savings depositor who must pledge or assign his \$500 or \$1,000 savings account rich? Yet, appellant Bank Board says he must lose his \$65 or \$130 share of the association's surplus.

The "poor" to whom appellant Bank Board "gives" include all savings depositors whose accounts are less than \$10,000 each and are unpledged and unassigned. A series of such \$10,000 accounts in a single family often exceeds \$50,000 to \$100,000 per family. Is a family with \$50,000 or \$100,000 in unpledged savings deposits poor? Yet, they will get the \$65 taken by the Bank Board

from the \$500 depositor who pledged or assigned his savings account to secure his debt.

The \$65 of surplus so taken from the "rich" will be added to increase the \$13,00 share of surplus going to the "poor".

The "rich" who has only \$500 (and that pledged for his debts) loses his \$65 to increase the \$13,000 share of the "poor" who has \$100,000 of savings deposits free and clear of any pledge.

For this result the Bank Board sets aside the Act of Congress (12 U.S.C. §1464(1)), Long Beach Federal's charter and the Settlement Agreement; so as to obtain the Board's ideas of "fair and equitable".

This is not the insanity it might appear to be. The Bank Board hoped to split Long Beach Federal's savings depositors into factions and set these factions at war with each other. If this took place no merger could be made. This is the same Bank Board whose predecessors twice seized this same Long Beach Federal on ex parte charges of "unsafe and unsound" management. Twice this same Bank Board caused disastrous runs of withdrawals. In 1946 over \$10,000,000 (about 1/2) was so withdrawn out of \$22,000,000 of then savings deposits. In 1960 \$69,000,000 (more than 70%) was withdrawn out of \$96,000,000 then savings deposits. [3R-1125-1130]

Twice the appellant Bank Board administration was investigated and its seizures and destruction condemned by Congressional Committees, in 1946 and again in 1960.^{44/} A third

^{44/} See page 42-44 hereof for details of Congressional Committee reports.

seizure threatened in 1949 was blocked by a Federal Court injunction [14 F.R.D. 273]. A third Congressional investigation in 1950-1952 resulted in Congressional amendments to the United States laws [12 U.S.C. 1464d as amended in 1954]. The amendments made the appellant Bank Board liable to suits in the local United States District Courts where the seized savings and loan association is located.

Twice this same Bank Board withdrew its phony charges and returned the seized Long Beach Federal to the same management from which it has been seized. [3R 1125-1130]

A Shareholders' (depositors) Protective Committee was formed. It sued the Bank Board in 1946 and again in 1960. To settle these damage and accounting suits pending against it appellant Bank Board (through the Federal Savings and Loan Insurance Corporation) in 1962 paid over \$5,000,000 as damages to the seized Long Beach Federal. Such damage payments were recommended by the Congressional investigating committees^{45/} and approved by both State and Federal Courts. [Plaintiff's Exhibit "10-A", pg. 21]

No "presumption of correctness" can apply to any actions of this appellant Bank Board with this dismal record. A Bank Board that twice seizes and almost destroys a \$100,000,000 Federal savings association only to twice return it to the very same management must be presumed to be equally wrong when it abrogates

^{45/} See page 69-70 hereof for quotation of Committee recommendation.

the restored Association's charter. At best appellant Board was mistaken and inept. At worst malicious and punitive.

But whether by accident or by design, in 1963 the Bank Board again fired its blunderbuss into the crowd of 60,000 Long Beach Federal savings depositors. The Bank Board in 1964 said to the trial court that in 1962 it saw "pickpockets" scattered among the depositors and that it must "protect" the "small depositors" against them. [Tr. 122] Hence the blast from the blunderbuss.

How a \$500 savings depositor is "protected" by the Board forfeiting his \$65 share of Long Beach Federal's surplus is a mystery; especially when it is forfeited to a group of savings depositors whose accounts are up to \$10,000 each and whose share of the surplus is at least \$1,300 each.

But in 1946 and in 1960 the predecessors of this same Board saw "unsafe and unsound management" in charge of Long Beach Federal and seized Long Beach Federal to "protect it". [3R-1125-1130]

In 1948 and again in 1962 this same Board returned the seized Association to the very same "unsafe and unsound management" [3R 1125-1130] from which it was seized.

Again in 1949 yet a third seizure was threatened but stopped by the trial court's injunction [14 F.R.D. 273]. When the 1949 injunction was dissolved in 1953, the same "unsafe and unsound" management was still left in Long Beach Federal by the Bank Board for 7 years more until the 1960 seizure [189 F. Supp. 589].

In 1962 this same Board paid Long Beach Federal over \$5,000,000 to settle damage suits for its prior seizures. [3R 1140-1141] This \$5,000,000 was paid to the very same "unsafe and unsound" management from which Long Beach Federal was twice seized and threatened with a third seizure.

If, as the Board claims, it saw "pickpockets" among Long Beach Federal's depositors, why did the Board resist all the Long Beach Federal's many months of efforts to bring such matters before the Federal Courts?

Long Beach Federal repeatedly in 1962-1963 asked appellant Bank Board to be allowed to complete the merger and then let the Court decide how Long Beach Federal's surplus should be divided among its 60,000 depositors. For almost a year from the summer of 1962 until June of 1963, the Board refused. [Plaintiff's Exhibit "21"- "16", pg. 4] On April 27th, 1963 Long Beach Federal's depositors held a mass meeting in the Long Beach municipal auditorium. Among the resolutions unanimously passed were:

(1) A resolution thanking the large depositors for coming to the aid of the Association when it was restored in 1962 after the disastrous \$69,000,000 run^{46/}; and

(2) Another resolution asking the United States

Congress to again help the damaged Association to merge with Equitable as the Bank Board had agreed in the February 1962 Settlement Agreement.

(Said resolutions are part of plaintiff's Exhibit 7-A 2-7). The shareholders' meeting was recessed.

IX.

WHATEVER MAY BE THE POWER OF THE BOARD
BASED UPON FINDINGS OF FACT IT CANNOT
FORFEIT PLAINTIFF'S SAVINGS DEPOSITS BY
MERE EDICT OR FIAT ISSUED AFTER THE
DEPOSITS WERE MADE.

There is nothing illegal or inherently wrong because savings deposits exceed \$10,000 each, or because savings accounts regardless of size are pledged or assigned.

There is no prohibition in either statutes or regulations in any way restricting the size of savings accounts either singly or in combinations. Nor is there any prohibition against pledging or assigning any savings account big or little.

Instead, both statutes and regulations expressly recognize and provide for both accounts over \$10,000 each and for pledging or assigning savings accounts regardless of size. 47/

The only findings made by the Bank Board are in its order No. 17177 [Pls. Exh. 3-D-4]. The Bank Board says:

" . . . The Federal Home Loan Bank Board has determined that . . . said Merger Agreement . . . is advisable and in the interest of all concerned; and that the distribution of the 791,650 shares of guarantee stock of Equitable Savings and Loan Association to the shareholder members of Long Beach Federal Savings and Loan Association in the manner specified in Articles VII and VIII of said

Merger Agreement is fair and equitable;"

These generalities do not even glitter. Instead they deceive and delude. Defendants Bank Board, et al., admit that they take 205,829 shares of Equitable stock, about \$2,500,000 ^{48/}, from thousands of Long Beach Federal depositors. They are those who have borrowed or pledged their savings accounts regardless of size and those whose accounts exceed \$10,000 each.

Appellants' findings that such a forfeiture is "advisable and in the interests of all concerned" and is "fair and equitable" contain no statement of any basis for confiscation of the statutory [12 U.S.C. 1464 (i)] and charter rights and ownership of the excluded Long Beach Federal depositors. They contain no finding nor even an accusation of any crime or wrong which would authorize forfeiture.

Such are not findings. They are not even conclusions. For it certainly cannot be "in the interests" of those who lose, for \$2,500,000 ^{48/} to be taken from them who are wholly excluded and given to another group which are thereby preferred.

For it to be "fair and equitable" to thus prefer one and exclude others, some basis or justification must be shown by the findings for such punitive and confiscatory action. To merely say it is "fair and equitable" or it is "advisable" or is "in the interests of all concerned" is not enough to condemn the owner to forfeiture of his property.

If there is any basis for denying all depositors who have pledged or assigned their accounts, their charter pro rata share of the surplus of their mutual association, such basis must be stated explicitly and understandably in the Bank Board's findings. If there is any justification in law or fact for all savings accounts in excess of \$10,000 each to forfeit their statutory and charter rights to their pro rata share of the Association's surplus, that also must be plainly and clearly stated in the findings.

Absent such statements or findings, the Bank Board's orders are confiscation pure and simple. They also are unconstitutional.

If there were any facts or reasons justifying the exclusions and forfeitures inflicted by the Bank Board, those facts must be stated and found.

Suspicion and rumor are not enough. But the Bank Board's orders do not even contain that. They contain no accusations and no findings. No basis is stated in any order. Instead, the orders just penalize, forfeit and exclude.

Such is contrary to every concept of constitutional law and many Supreme Court decisions.

In Securities and Exchange Com. v. Chenery Corp., 371 U.S. 656, 38 U.S. 80 (U.S. Supreme Court - 1942) officers, directors and majority stockholders bought on the open market stock in their own company. These purchases were made during the pendency of reorganization proceedings before the S.E.C.

The S.E.C. refused to approve the reorganization unless the majority stockholders surrendered their stock for cancellation. The stockholders sued, the Court of Appeals set aside the forfeiture order and the U. S. Supreme Court affirmed, saying at page 635-637 L.ed., 92-95 U.S.:

" . . . But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards -- either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11 (e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commissioner.

" . . .

" . . . Its action must be measured by what the Commission did, not by what it might have done. . . . The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . [citing authority] There is no such finding here." [Emphasis added]

In the second Chenery case, 91 L.ed 1995, 332 U.S. 194, the Court cites and approves the above principles of law and said

at L.ed page 1999-2000, U.S. p. 196-199:

" . . . a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . .

" . . . If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; . . ."

In Anglo-Canadian Shipping Co. Ltd. v. Federal Maritime

Com'n. 310 F.2d 606 (1962), this Court of Appeals for the Ninth Circuit invalidated Federal Maritime Commission orders made upon findings similar to those of the Bank Board in our case. The Maritime Commission had found that agreements to pay less than the specified rate of brokerage "operate to the detriment of the commerce of the United States, and are contrary to the public interest," [p. 607]. Just as in our case there is no law or regulation authorizing a forfeiture of savings accounts in excess of \$10,000 each, or which are assigned or pledged, this Court said at page 609:

" . . . there is no law, rule or regulation which requires an individual carrier to pay brokerage to any one."

This Court held the quoted "finding" wholly inadequate and the order based thereon void, and said at pages 613-617:

" . . . As the Supreme Court has said in matters calling for administrative determinations similar to this one: 'There must be a

full hearing. There must be evidence adequate to support pertinent and necessary findings of fact.' *Morgan v. United States*, 298 U.S. 468, 480, 56 S.Ct. 906, 911, 80 L.Ed. 1288. . . . Not only was there a want of hearing and evidence, but also a complete failure on the part of the Commission to conform to the requirements of § 8(b) of the Administrative Procedure Act, (Title 5 § 1007(b)), whereby parties are afforded an opportunity to propose findings and to note exceptions to decisions or recommended decisions. . . . 'The Administrative Procedure Act requires all decisions to state not only findings and conclusions, but also "the reasons or basis therefore, upon all the material issues of fact, law or discretion presented on the record * * *," Section 8(b) 5 U.S.C.A., Section 1007(b). The Board 'should make the basis of its action reasonably clear.' . . . [citing authorities]

" . . .

" . . . there is no exception to the requirement of § 8(b) for findings sufficient to support the Commission's order. Those findings are completely lacking in this record. The cases holding that such findings are essential in an administrative proceeding such as this are legion.³ The general conclusion stated in the Board's final order and supplemental report, phrased in the language of the statute, does not conform to the requirements of the Administrative Procedure Act, nor does it satisfy the rule respecting the necessity of findings. The requirement of specific, definite and basic findings, other than mere ultimate findings or conclusions, is well settled. Thus in *Florida v. United States*, 282 U.S. 194, 213, 51 S.Ct. 119, 124, 75 L.Ed. 291, the Court said: ' . . . This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient . . . ' .

" . . . in *Colorado-Wyoming Co. v. Comm'n*, 324 U.S. 626, 634, 65 S.Ct. 850, 854, 89 L.Ed. 1235, the Court said: 'But we must first know what the "finding" is before we can give it that conclusive weight. We have repeatedly emphasized the need for

³ Many of them are collected in Davis, Administrative Law Treatise, Chap. 16, §§ 16.01 to 16.14.

clarity and completeness in the basic or essential findings on which administrative orders rest,' citing the Florida and other cases."

". . . What this involves was spelled out in clear language in *Saginaw Broadcasting Co. v. Federal C. Com'n.* 68 App.D.C. 282, 96 F.2d 554, 559. There after noting the necessity for findings of fact by administrative boards, and Commissions, and the reasons for that requirement, the court said: 'In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basis or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion.'⁵ See also *United States v. Chicago, M. St. P. & P.R. Co.*, 294 U.S. 499, 510, 55 S.Ct. 462, 79 L. Ed. 1023.

". . .

"[3] As noted in the *Saginaw* case, 96 F.2d at p. 563, the absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings. . . ."

"5. This case is discussed in a note on 'Necessity, form, and contents of express finding of fact to support administrative determinations' in 146 A.L.R. 209, at pp. 220, ff., where it is referred to as a leading case."

In *State of New York v. United States of America*, 96 L. ed 662, 342 U.S. 882 (U.S. Supreme Court - 1951) the Supreme Court was considering administrative action made without adequate findings. Mr. Justice Douglas dissented and said at L.ed page 663, U.S. page 883-884:

"We have here no finding as to the necessary relation between interstate and intrastate commutation rates. . . .

"Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal." [Emphasis added]

It is cited because the dissent of 13 years ago has been repeatedly cited and quoted including Davis on Administrative Law, Volume 2, Paragraph 16.05, page 447 and by the Supreme Court of California in California Motor Transport Co. v. Public Utilities Com., 59 C. 2d 270 (1963) at 274.

In California Motor Transport Co. v. Public Utilities Com., the California Supreme Court reversed the Public Utilities Commission for findings, almost identical with those made by the Bank Board in our case. The California Supreme Court said at pages 274-275:

". . . The ultimate finding of public convenience and necessity is so general that without more, a reviewing court can only guess at how it was reached. [Citing authorities]

". . .

"Findings on material issues can also serve to help the commission avoid careless or arbitrary action. [Citing authorities] . . . There is no assurance that an administrative agency has made a reasoned analysis if it need state only the ultimate finding of public convenience and necessity . . ."

In Coffey v. Jordan, 275 F. 2d 1 (U.S.C.A.-Dist. of Columbia - 1959) the District of Columbia Superintendent of

Insurance suspended the license of an insurance broker because of an alleged misconduct. The District of Columbia Court of Appeals reversed and said at page 2:

"We think the District Court erred. Although § 35--426, under which appellee acted, contains no express requirement for findings, 'the practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement.' . . ."

Citing many authorities including Securities and Exchange Com. v. Chenery Corp., 87 L.ed. 626, 318 U.S. 80.

In Interstate Commerce Com. v. Louisville & N.R.Co., 227 U.S. 88, 57 L. ed. 431 (1913) the Commission had made findings after hearing. On appeal the Government sought to sustain the findings regardless of any evidence to support them. The U.S. Supreme Court said at U.S. p. 91-92-93, L. ed. page 433-434:

". . . A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

BY THE TERMS OF APPELLEE LONG BEACH FEDERAL'S
CHARTER IT COULD NOT BE AMENDED WITHOUT THE
ASSOCIATION'S CONSENT

The charter of an association or corporation (Long Beach Federal) is a contract between the corporation, the Bank Board and the association's members.

In The Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. ed. 629, the U. S. Supreme Court was considering the charter of Dartmouth College. The Court said at U. S. page 643, L. ed. page 661:

"This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, . . . "

By the terms of the contract between the Bank Board, the Association and all members of the Association the power of amendment to Long Beach Federal's charter is reserved to the joint action of the Bank Board and the association's members. Neither can amend it without the consent of the other. Section 11 of the Long Beach Federal charter, charter K provides:

"11. Amendment of charter. No amendment, addition, alteration, change, or repeal of this charter shall be made unless such proposal is

made by the board of directors of the association, and submitted to and approved by the Federal Home Loan Bank Board, and is thereafter submitted to and approved by the members at a legal meeting. Any amendment, addition, alteration, change, or repeal so acted upon and approved shall be effective, if filed with and approved by the Federal Home Loan Bank Board, as of the date of the final approval or as fixed by, the members." [Emphasis added] 49/

That such a contract was deliberately made by the Bank Board with the shareholders of all federal savings and loan associations including Long Beach Federal is explicitly stated by the board's then general counsel in his book "Savings and Loan Associations" by Horace Russell general counsel for Federal Home Loan Bank Board from 1932-1938. He says in Chapter 7 "The Federal Savings and Loan System" at pages 65 and 66:

"The Federal Savings and Loan System was organized under a very short statute because it appeared that a comprehensive statute could not be passed at that time. In order to avoid too numerous and rapid changes in the program, the device was used of incorporating all the remaining elements of a sound Savings and Loan law in the charter of the Association, and an agreement was accomplished that charters would not be amended without the consent of the Association and the Board. . . ." [Emphasis added]

The power to amend was reserved to the Congress to make any amendments to the law it might see fit with or without the consent of anyone. But the power of the Board to make amendments to the regulations affecting the charter of the Federal association was, by the terms of the Association charters as drawn by the Board's own general counsel, limited to changes consented to

by the Associations. Section 3 of Long Beach Federal's charter K reads:

" . . . The association shall have such powers as are conferred by law and shall exercise its powers in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, or as they may hereafter be amended, and with the rules and regulations made thereunder which are not in conflict with this charter."
[Emphasis added] 50/

The Federal Home Loan Bank Board by giving Long Beach Federal Savings and Loan Association its charter contracted with the Association and with every future savings investor therein. The charter (contract) repeatedly stated that the association would be mutual and that all savings investors would receive equal and mutual treatment. Section 3 of the charter reads:

"3. Objects and powers. -- The objects of the association are to promote thrift by providing a convenient and safe method for people to save and invest money and to provide for the sound and economical financing of homes. The statute, this charter, and rules and regulations made thereunder provided for examination and supervision and at the same time for the protection of all private rights concerned, and shall be construed in keeping with the best practices of local mutual thrift and home-financing institutions in the United States." [Emphasis added]

Section 9 of the Charter reads:

"9. . . . All holders of share accounts shall participate equally in dividends pro rata to the participation value of their share accounts; provided that the association shall not be required to credit dividends on inactive share accounts of

\$5 or less. . . . All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." [Emphasis added] 51/

To now require that all share accounts of over \$10,000 each, or which are pledged or assigned, shall not "be entitled to the equal distribution of net assets, pro rata to the value of their share accounts . . ." is to amend and repeal Long Beach Federal's charter. The charter says:

"All holders of share accounts shall participate equally."

The Bank Board says:

"No share account of more than \$10,000 or which was pledged or assigned shall participate at all."

Instead all share accounts of less than \$10,000 which were not pledged or assigned are to take what belongs to them and also to take what belongs to the over \$10,000 accounts, or to the accounts pledged or assigned.

This confiscates about \$2,500,000 that belongs to the \$10,000 (or over) accounts and gives it to the less than \$10,000 accounts.

This is neither equality nor mutuality.

It denies "the equal protection of the laws" guaranteed by the United States Constitution. It also violates the "due process" clause of said Constitution.

XI.

THE TRIAL COURTS 1,899 JUDGMENTS ARE JUST
AND EQUITABLE. THEY SHOULD BE AFFIRMED
REGARDLESS OF WHETHER THIS COURT OF APPEALS
APPROVES ALL THE TRIAL COURTS REASONS FOR
ENTERING SUCH JUDGMENTS.

Appellants attack the trial court's judgments as if they were but a single judgment. Actually, the trial court made over 1,899 separate judgments.^{52/} Appellants forfeited the 1,899 savings accounts rights to share in the association's surplus regardless of any individual alleged "guilt" or innocence of any one or more of the approximately 3,800 forfeited savings depositors who owned the 1,899 forfeited savings accounts.^{53/} Appellants forfeited all single new savings accounts to the extent they exceeded \$10,000 per account. But yet permitted an unlimited series of new accounts of \$10,000 each, owned by a single family, to participate in full.

Appellants also forfeited all savings depositors, old or new, big or little, who had pledged or assigned their savings account for any debt.

^{52/} 3R 1642 through 1706 is 64 pages of separate judgments in favor of each of the 1,899 savings accounts which appellants forfeited. Each item is a separate judgment for each savings account owner. There are about 40 items per page and a total of 50 pages.

^{53/} Most savings accounts are owned by 2 or more savings depositors as co-owners, joint tenants, trustees for minor children, etc.

It is no fraud, crime or wrong to borrow money and pledge a savings account as security. Nor is it a fraud, crime or wrong to have more than \$10,000 in any single new savings account.

Yet these are the only tests of appellants forfeitures. Appellants forfeit all single new savings accounts to the extent they exceed \$10,000. Yet they favor 10 new savings accounts of \$10,000 per account or less totaling \$100,000 or more, all owned by members of the same family.^{54/}

Individual innocence or alleged "guilt" of any of the owners of the forfeited savings accounts was no part of the reason or basis for any of appellants forfeitures.

Instead all appellants forfeitures were by arbitrary classification wholly regardless of any individual merits, or justice or right or alleged "wrong".

The trial court invalidated all of appellants 1,899 forfeitures as " . . . illegal, and void, . . . arbitrary and contrary to, and without authority in, law." [233 F. Supp. 578 at 598 - Appx. 1-a hereof].

But in entering judgment the trial court was careful to separately enter 1,899 separate judgments. There is a separate individual court judgment in favor of each individual savings account illegally forfeited by appellants.^{55/}

^{54/} See page 79 to 82 hereof for more details re appellants treatment of multiple accounts of \$10,000 per account.

^{55/} 3R 1642 through 1706 is 64 pages of separate judgments in favor of each of the 1,899 savings accounts which appellants forfeited. Each item is a separate judgment for each savings account owner. There are about 40 items per page and a total of 50 pages.

The smallest such judgment is for .013 shares of Equitable guarantee stock. The largest is for 9230.769 shares. 1524 of such judgments are for 120 shares or less.

As to the thousands of wholly innocent and un-accused savings depositors, the trial court's 1,899 judgments are obviously correct and should be forthwith affirmed. There can be no possible justice or equity in taking any innocent savings depositors " . . . property and money, and giving it to another, as the [appellant] Bank Board attempted to do here." [233 F. Supp. 578 at 598 - Appx. 1-a hereof].

Nor can justice tolerate reversal of thousands of just judgments in favor of thousands of innocent savings depositors.

Yet appellants demand such mass reversal of all 1,899 judgments regardless of the individual innocence or alleged "guilt" of any one or more of the 3,800 depositors who hold the 1,899 trial court judgments.

Appellants falsely pretend to "protect" the "little savings depositors" against the big new depositors.

But of 1,899 savings accounts forfeited by appellants and restored by the trial court's judgments:

324 are \$ 500.00 or less

1,524 are \$ 11,000.00 or less

only 54 are \$100,000.00 or over. 56/

56/
(233 F. Supp. 578 at 599, last paragraph of FN) also plaintiffs exhibit "13" on motion for summary judgment.

If there were any "guilty" savings depositors among the thousands of forfeited innocent depositors appellants were required by law to individually accuse each of the "guilty" by name; and to specifically state what crime or wrong each was accused of. After each such individual accusation notice and hearings were required to hear and decide such accusations.

Appellants forfeitures consist of taking the statutory and charter shares of Long Beach Federal's \$9,500,000 surplus from the forfeited savings depositors and giving such forfeited shares to other savings depositors in defiance of the Act of Congress.

It is not necessary to forfeit the savings accounts of thousands of innocent savings depositors to establish and test the awesome powers of appellants Bank Board and California Savings and Loan Commissioner.

Their powers are vast and terrible. But such powers exist only to punish the "guilty," not to forfeit the innocent. And the power to punish the "guilty" by forfeiture exists only after personal individual accusation of specified guilt followed by notice and hearing.

The trial courts 1,899 separate judgments setting aside appellants illegal and arbitrary forfeitures are correct in result. They should be affirmed regardless of the reasons given by the trial court for its decision.

In Castner v. First National Bank of Anchorage, 278 F. 2d 376 (CA-9, 1960) this court of appeals was reviewing a summary judgment. This court said at page 381:

" . . . However, we are not concerned with the reasons given by the district judge for his action but rather center our inquiry upon a determination of whether the judgment he entered was right. J. E. Riley Investment Co. v. Commissioner, 1940, 311 U. S. 55, 61 S. Ct. 95, 85 L. Ed. 36; Kanatser v. Chrysler Corp., 10 Cir., 1952, 199 F. 2d 610; 5 C.J.S. Appeal and Error § 1464 (1). To do this we must now proceed to examine the record as it was presented."

In J. E. Riley Invest. Co. v. Commissioner of Int. Rev.

311 U. S. 55, 85 L. ed. 36 (U.S. Supreme Court 1940) the U. S. Supreme Court said at U. S. page 59, L. ed. page 40:

" . . . Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. Helvering v. Gowran, 302 US238, 245, 246, 82 L ed 224, 229, 230, 58 S Ct 154.

"Affirmed."

In Kanatser v. Chrysler Corp., 199 F. 2d 610, (CA-10, 1952) [Cert. denied 344 U. S. 921, 97 L.ed 710] the U. S. Court of Appeals for the Tenth Circuit said at page 616:

" . . . Respondent thus invokes the time honored and salutary rule to the effect that the issue on appeal is the correctness of the order or judgment assailed, not the reasons therefor, and if such order or judgment is sustainable on any legal basis, it is the duty of the appellate court to do so, even though the trial court may have given the wrong reasons for the order. U. S. v. American Ry. Exp. Co., 265 U.S. 425, 44 S. Ct. 560, 68 L.Ed. 1087. . . ."

By U. S. Statute and by Long Beach Federal's charter all savings depositors old and new, big and little were to be treated exactly alike.

Long Beach Federal's charter, section 9 reads:

" * * * All holders of share accounts shall be entitled to equal distribution of net assets, pro-rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the Association."

[233 F. Supp. 578 at 592; also pls. exh. "19"]

The:

" . . . statute provides that such Association shall be 'mutual', [12 U.S.C. §1464 (a)]; it requires the '[s]uch associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided.' [12 U. S. C. § 1464 (b)]; . . ."

Upon conversion of Long Beach Federal from a federal to a California state association by merger with appellee Equitable, the U. S. statutes made an additional express requirement:

" . . . 12 U. S. C. § 1464 (1), under which the conversion and dissolution is had, contains the second Congressional expression in the Statute as to the distribution of stock upon conversion and dissolution. . . . It reads: '(6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits.' . . ."

[233 F. Supp. 578 at 592]

Forfeiture is a form of punishment for crime, fraud or wrong doing. It can be inflicted only after and not before accusation, notice and hearing.

Appellants forfeitures violate Long Beach Federal's charter, the U. S. Statutes and the U. S. Constitution. No individual forfeited savings depositor has ever been accused by appellants of anything.

In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746
(1886) the United States Supreme Court said at U. S. pages 634-
635, L. ed. page 752:

" . . . proceedings instituted for the
purpose of declaring the forfeiture of a
man's property by reason of offenses
committed by him, though they may be
civil in form, are in their nature
criminal. . . . As, therefore, suits
for penalties and forfeitures, incurred
by the commission of offenses against
the law, are of this quasi criminal
nature, we think that they are within
the reason of criminal proceedings for
all the purposes of the Fourth Amendment
of the Constitution, . . . illegitimate
and unconstitutional practices get
their first footing in that way, namely:
by silent approaches and slight deviations
from legal modes of procedure. . . .
It is the duty of courts to be watchful
for the constitutional rights of the
citizen, and against any stealthy
encroachments thereon. . . ."

No forfeited savings depositors has been named nor has any forfeited savings depositor ever been notified of what, if any, wrong, crime or fraud he is accused of.

Appellants have made no finding of any fraud, wrong or crime by anyone. Yet, appellants Bank Board had their forfeitures under consideration for almost a year and had before them the individual savings account records of every savings depositor who they forfeited. [Pls. Exh. "21-62"].

No forfeited savings depositor has been heard to defend himself against appellants unknown and unstated accusations.

Forfeiture of savings depositors statutory and charter rights is a punishment which appellants can constitutionally inflict only upon proof of individual guilt or wrong against each and every forfeited savings depositor.

Appellants have offered no such proof.

Appellants have not even made accusation, against any individual savings depositor.

Appellants had four or more opportunities to make such accusations and to offer any proof they had.

Appellants most important opportunity was in appellant Bank Board's findings made in their order ^{57/} No. 17,177 dated June 14, 1963 approving merger it reads in part:

"WHEREAS, The Federal Home Loan Bank Board has determined that the dissolution of Long Beach Federal Savings and Loan Association in the manner embodied in said Merger Agreement, dated June 12, 1963, is advisable and in the interest of all concerned; and

^{57/} It is Pls. Exhibit "3-D-4" in evidence.

that the distribution of the 791,650 shares of guarantee stock of Equitable Savings and Loan Association to the shareholder members of Long Beach Federal Savings and Loan Association in the manner specified in Articles VII and VIII of said Merger Agreement is fair and equitable;"

In that order Appellants Bank Board made its only findings. The Board, had been considering the proposed merger of Appellee Long Beach Federal in to Appellee Equitable for over a year when it made said Order. Appellant Bank Board had before it for many months the individual savings and loan records and accounts of all the 1,899 forfeited savings deposits. [Pls. Exh. "21-62"]

The only findings whatever made by appellant Bank Board are that the forfeitures it requires are "advisable and in the interest of all concerned" and "fair and equitable". No where in said order, or anywhere, are any of the 3,800 forfeited savings depositors accused of anything. Nor is there any finding of any fraud, crime or wrong doing.

Appellants' next most important opportunity to make accusations or offer proof was before the mass meeting of the assembled shareholders of Long Beach Federal held in the Municipal Auditorium at Long Beach California.

Such mass meetings were held on April 27, 1963 and recessed until July 6, 1963. [Pls. Exh. "7-A-2-5; 7-A-2-8 " 12/9/63-6]

Appellants Bank Board representatives attended and were present at said mass meetings of said Long Beach Federal savings

depositors. [Pls. Exh. "7-A-4-8" at pg. 57 and 12/9/63-8]

At said meeting resolutions were unanimously passed by said Long Beach Federal savings depositors thanking the new and large savings depositors and those who had borrowed money to make deposit in savings accounts in Long Beach Federal for coming to the aid of the wrecked association in this hour of dire need.

Such resolutions are:

Plaintiff's exhibit 12/9/63-6 page 7. ^{58/}

Appellants Bank Board representatives were present at said meeting. Yet they had nothing to say to the assembled Long Beach Federal savings depositors. [12/9/63-6 pg. 7]

If appellants had any proof of fraud, crime or wrong doing against any savings depositors, it was appellants statutory duty to present that proof to warn the assembled savings depositors and for their consideration, when the resolutions thanking the larger savings depositors were unanimously passed by all Long Beach Federal savings depositors.

Appellants third most important opportunity to make accusations or present proof was when they drafted their answers and defenses to plaintiff's complaints in the class action in the trial court.

It is fundamental and basic law that fraud must be specifically alleged in detail and must be thoroughly established

^{58/}

See also pages 135 and 137 hereof where the adoption of such resolution is further discussed.

by evidence and proof. 59/

59/

Federal Rules of Civil Procedure Rule 9 (b) requires:

"PLEADING SPECIAL MATTERS

"(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . . "

This Ninth Circuit Court of Appeals has repeatedly ruled that fraud must be specifically alleged in detail and proved and established by clear and convincing evidence.

In Richmond v. Weiner, 353 F. 2d 41 (CA-9, 1965) this Court of Appeals said at page 45:

"The law requires that fraud as an issue be specifically pleaded as indicated by the following:

'Clearly, in an action for deceit, or other suit in which the cause of action is based directly upon fraud, the fraud must be pleaded.' 24 Am. Jur. 72.

'In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.' Rule 9(b), F.R. Civ.P.

'A pleading requisite to enable the party who files it to offer parol evidence of fraud in a written contract for the purpose of avoiding the contract should contain allegations of the fraud that are clear and positive.' 24 Am. Jur. 74; 56 A.L.R. 148.

"Here appellant did not, in her original complaint, in her answer to appellee's counterclaim or in the pretrial order, allege or contend . . . fraud. . . . We, therefore, on this appeal cannot consider that issue, because appellant did not plead it or validly bring it before the Trial Court, and that Court properly did not determine it. United States v. Waechter, 9 Cir., 1952, 195 F. 2d 963, 964; Pacific Queen Fisheries v. Symes, 9 Cir., 1962, 307 F.2d 700, 719-720; Monge v. Smyth, 9 Cir., 1956, 229 F.2d 361, 366 Syl. 2."

Yet appellants answers contain no specific accusations against anyone by name, by amount, by savings account number or any other detail. Only vague generalities are hinted at, but not alleged by appellants Bank Board, et al. Appellant Savings and Loan Commissioner makes no allegations whatever of fraud, etc.

[1R-371-374]

Appellants were specifically asked by the Trial Court if they wished to file any cross-complaint or make any specific allegations. Appellants expressly declines to do either. ^{60/}

Appellant's fourth opportunity to make accusation and to present proof of any fraud, crime or wrongdoing was when the Trial Court ordered both sides to serve and file Motions for Summary Judgments and to make replies or oppositions to such Summary Judgment Motions.

Appellants made no factual showing of any kind whatsoever naming any names, referring to any amounts or any savings account numbers or stating any facts of any fraud, crime or wrong against any named savings depositor or specific savings account amount among all the 1,899 which appellants have forfeited.

Instead, appellants made vague references to "dilution", "insiders" and similar uncertainties.

Appellants had taken 6 depositions among them were the President of Long Beach Federal, the President of the City National Bank of Beverly Hills, and several large Equitable stockholders and Long Beach Federal depositors.

The depositions covered 341 pages with an additional 42 pages of exhibits. Yet appellants did not offer any of said depositions or any part thereof for the consideration of the Trial Court, nor did they in any way bring said depositions or any of them to the attention of the Trial Court.

Appellants attempted, nevertheless, to use said depositions (never seen by the Trial Court) as part of their record on their appeal to this Court and even filed their opening briefs containing reference to such depositions never seen by the Trial Court.

After hearings before this Court of Appeals on notice, appellants were required to re-brief their case omitting therefrom all references to the depositions and other matters never offered by appellants to the Trial Court not seen or considered by that Court.

The Order of this Court of Appeals so ordering is filed in these appeals in appeal numbers 20522, 20378 and 20447 and is dated September 20, 1966.

No where in appellant's brief to this Court of Appeals has any appellant made any claim or showing to justify forfeiture of all 3,800 savings depositors who hold the 1,899 forfeited savings accounts.

On page 55 of appellant Bank Board's opening brief they refer to 7 or 8 depositors who have individual accounts ranging between a \$1,167,800.00 and \$250,000.00.

On page 54 they make a tabulation that shows that Long

Beach Federal had 33 accounts of \$20,000 to \$50,000 each in 1960 and 124 such accounts in 1962.

On page 10 they make further comparison as to 6 accounts of over \$100,000 each at the time of merger as contrasted but with one account of \$100,000 before the 1960 seizure.

It is thus obvious that appellant's forfeitures of 1,899 savings accounts are not based upon any individual wrong, fraud or crime of any forfeited account holder, but solely upon the size of the account or status as pledged or assigned to secure debt.

To state the matter plainly as found by the Trial Court, appellants forfeitures are purely arbitrary and without basis in law. (233 F. Supp. 578 at 598)

Appellant Bank Board's own Chairman McMurray under oath stated the only basis for the forfeitures. He said "the \$10,000 figure was selected because it was the maximum amount of federal account insurance; the board believe that generally that accounts would not be opened by bona fide savers in amounts larger than \$10,000 in any one account." Appellants opening brief page 15-16 (McMurray Affidavit 3R-1002) But he told Congress the contrary. (See page 61-63 hereof)

But whether or not a savings account is "bona fide" cannot be determined solely by the size of the individual accounts. \$100,000 deposited in a single account can be genuine and bona fide and another \$100,000 deposited in 10 separate accounts of \$10,000 each in the names of combinations of husband and wife,

husband and daughter, wife and son, husband and mother-in-law, etc., so as to make 10 separate accounts, numbers and groups would appear to demonstrate lack of genuineness rather than being bona fide.

Yet the \$100,000 single account is forfeited by appellants and the 10 \$10,000 single accounts aggregating \$100,000 are favored and preferred. They take not only their own share of Long Beach Federal surplus but also the forfeited shares of the \$100,000 single accounts.

Appellants Bank Board "belief" that new accounts would not be opened by bona fide savers in amounts larger than \$10,000 in any one account is demonstrated false by the survey made by the United States Savings and Loan League at year end 1964. The 1965 SAVINGS AND LOAN FACT BOOK issued by said league says in part on page 19:

"At year-end 1964, a survey by the United States Savings and Loan League shows, 31.4% of all savings at associations were in accounts that had balances in excess of \$10,000. . . ." (emphasis added) 61 /

61 / In United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L.ed. 2d 915 (1963) the U. S. Supreme Court said at U. S. page 323, L. ed. page 922 in footnote 2:

"2. The discussion in this portion of the opinion draws upon undisputed evidence of record in the case, supplemented by pertinent reference materials. . . ." (emphasis added)

listing text books on banking, articles in banking trade association journals, law review articles and various publications.

Thus appellants swore under oath that they believed almost one-third of all the savings accounts in all the savings and loan associations throughout the United States are "not opened by bona fide savers" because such accounts had balances in excess of \$10,000 each.

XII.

\$4,606,250,000 OF NEW SAVINGS DEPOSITS WERE
MADE IN 108 LOS ANGELES - LONG BEACH SAVINGS
ASSOCIATIONS IN 1962. NONE WERE PENALIZED
EXCEPT LONG BEACH FEDERAL

In April 1960, appellants seized Long Beach Federal for the second time. Long Beach Federal then had about \$96,000,000 in savings deposits. [3R-1126] Appellants' 1960 program was to again ruin and destroy the seized Long Beach Federal as they had in 1946-1948. A \$69,000,000 run of withdrawals of savings deposits followed the 1960 seizure. [3R-1126] By April 1962, but \$30,000,000 of savings deposits remained in the wrecked Association, when it was returned to its founding management. [3R-1138]

\$24,000,000 of new savings deposits came into the Association within two days of its restoration and \$42,000,000 of new deposits were in the Association by November 30, 1962.

Appellants would partially forfeit and penalize \$19,000,000, or almost one-half, of these new savings deposits.

Appellants pretend that the \$42,000,000 of new savings accounts are "temporary" or "free riders". But the truth is, appellants were bitterly disappointed that Long Beach Federal could regain any of its lost savings deposits.

Appellants originally based their entire attack on the all new savings depositors because of accounts of \$100,000 or more each. But these 54 accounts constituted only 3% by number of the approximately 1,900 savings accounts now forfeited and penalized

by appellants. Over 80% by number (about 1,524) of the savings accounts appellants would forfeit, are each \$11,000 or less. About 17% (about 324) are each \$500.00 or less. [3R-1511]

Certainly Long Beach Federal should be able to regain its original \$96,000,000 of savings deposits it had at the time of its 1960 seizure.

The \$42,000,000 total of new savings deposits added to the \$30,000,000 remnants of April 1962, came to only \$72,000,000 total. Long Beach Federal was yet short by about \$24,000,000 from being back to the \$96,000,000 in savings deposits it had when seized in 1960. Yet, for this partial recovery, thousands of the new savings depositors are penalized and forfeited by appellants.

Appellants falsely pretend that rapid changes in savings accounts are unusual or evil. Appellant's Bank Board Chairman McMurray says accounts of over \$10,000 are temporary and are not bona fide. But their own Source Book published by them for the year 1963, discloses that the average turnover in all 108 savings and loan associations in Long Beach and Los Angeles area for the calendar year 1962 was over one-half, or about 54% of the total of all savings deposits. Photocopies of the cover pages and pages 12 and 18 of appellants' 1963 Source Book are Appendix 1-d hereof. They disclose:

	<u>Percentage</u>
Total 1962 savings capital all 108	
Los Angeles - Long Beach savings	
associations (page 12 of the	
Source Book)	\$8,549,444,000 = 100%

Total 1962 <u>new</u> savings capital	
deposits in <u>all</u> 108 Los Angeles -	
Long Beach savings associations	
(page 18 of the Source Book) . . .	\$4,606,250,000 = 54%

54% of Long Beach Federal's 1960 total of \$96,000,000 of savings deposits is \$51,840,000. Long Beach Federal in 1962 got back only \$42,000,000 of new deposits. This is about \$10,000,000 less than the average percentage of new deposits in all 108 savings associations in the Long Beach - Los Angeles area.

Yet appellants would forfeit and penalize thousands of Long Beach Federal savings depositors. But NONE of the depositors in any of the 107 other Long Beach - Los Angeles area associations are penalized or forfeited in any way.

Appellants own Source Book demonstrates that a 54% turnover in savings deposits for the year 1962 was the average for all the 108 savings and loan associations then in the Los Angeles - Long Beach, California area.

The net result to each association of said 54% turnover, of course, differs. Some gained, others lost.

But these figures of a 54% yearly turnover demonstrate the falsity of the appellants pretenses that any savings depositors are permanent. In two years 108% will be new deposits.

The penalties inflicted on Long Beach Federal alone because of rapid shifting or transferring of savings deposits is pure animosity of the appellant Bank Board against Long Beach Federal. Otherwise all of the 107 other savings associations in the Los Angeles - Long Beach area should have also been penalized for their 54% average turnover in total savings accounts in 1962.

The penalizing of Long Beach Federal savings depositors who made their deposits in amounts of \$10,000 or more per account is even more revealing.

XIII.

APPELLEE SHAREHOLDERS' PROTECTIVE COMMITTEE .
PROPERLY REPRESENT ALL 60,000 LONG BEACH FEDERAL
SAVINGS DEPOSITORS. THEY REFUSE TO ACCEPT ANY
FORFEITED STOCK: NONE HAVE JOINED WITH APPELLANTS

Appellants attack the District Court's findings and order that appellee Shareholders' Protective Committee properly represent the entire class of all 60,000 Long Beach Federal savings depositors. ^{62/}

No appellant, however, tells this Court that the District Court made this finding only after several days of trial (December 9-12, 1963) with witnesses on the stand, exhibits ^{63/} introduced and cross-examination by appellants counsel Assistant U. S. Attorney Dooley. Prior to said trial an Order to Show Cause, notice of hearing and a copy of plaintiff's entire complaint in action No. 63-1072-P.H. was personally mailed to everyone of the 60,000 savings depositors at their respective addresses shown on appellee Long Beach Federal's savings records. Such mailing was done pursuant to the order of the District Court.

Said Order to Show Cause and notices were also published in the Long Beach daily newspapers and other Los Angeles County newspapers. This was but one of 5 similar notices given to all

^{62/} Appellant Bank Board makes its attack in footnote 2, page 3 of its opening brief. Appellant California Savings and Loan Commissioner makes his attack at page 42-47 in his opening brief.

^{63/} Plaintiff's Exhibits 12/9/63 and 12/12/63.

Long Beach Federal depositors by direct mailing and by publication. 64/

64/ No Long Beach Federal savings depositors will accept any of the forfeited stock offered them by said Bank Board. Repeated notices have been mailed, and published, to all 60,000 Long Beach Federal savings depositors of the Bank Board's forfeitures and preferences. Said publication was in Long Beach and Los Angeles daily newspapers. Said mailings were personally addressed to each of the thousands of Long Beach Federal depositors.

Such notices include those mailed and published:

(a) In March, 1963, of the April, 1963 special mass meeting of Long Beach Federal savings depositors held in the Long Beach Municipal Auditorium; [Pl's. Exh. 12/9/63-6; 7-A-2-5; 7-A-2-3]

(b) In June, 1963, of the July 6, 1963 continued, and resumed, mass meeting of Long Beach Federal savings depositors in the Long Beach Municipal Auditorium; [Pl's. Exh. 12/9/63-7; 7-A-AA-3-2]

(c) In July, 1963, of the August 16, 1963, public hearing held by the Savings and Loan Commissioner of the State of California; [12/12/63-13]

(d) In November, 1963, of the Order of Distribution of \$7,000,000 of said Equitable stock from Court among said 60,000 Long Beach Federal savings depositors; [3R-298-300BBB] and

(e) In May, 1965, of the entry of Judgment by the U. S. Trial Court for equal and pro rata distribution and declaring said forfeitures illegal and void, and of plaintiff's application for attorneys' fees. [3R-1748-1755]

These notices are all in addition to the mailed and published notices of March 1962 of the court dismissal of the class actions [3R-1748-1755] in reliance upon said Settlement Agreement and its provisions for equal and pro rata distribution.

In each of the mailed and published notices sent to all 60,000 Long Beach Federal savings depositors, by order of the court, there was a requirement made by the court that any savings depositor objecting to equal and pro rata distribution appear before the court and state his objections. [3R-1753-1755] With but one exception none of the 60,000 savings depositors ever made any objection. The lone objector was an attorney whose stock distribution would have amounted to less than \$200. He at first appeared and objected, but later dropped out. He never intervened or took any active part in the litigation. He is not a party to these appeals. He appeared for himself alone. He was one alone, out of 60,000. [233 F. Supp. 578 at 591]

None of the 60,000 savings depositors would take the forfeited stock of their fellow depositors. None have appeared before this or any court and sought to enforce said forfeitures. Nor do any of them support the Bank Board's position. Nor do any of them join appellants in these appeals.

No appellant offered any testimony or offered to produce any evidence to the trial court that the Shareholders' Protective Committee who for 20 years has litigated before the U. S. Supreme Court, this Court of Appeals, the Federal trial court, the California State trial and appellate courts and Congressional Committees, has now suddenly become disabled to continue such representation.

In Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (CA-9, 1964) this U. S. Court of Appeals for the Ninth Circuit said at page 914:

" . . . Adequacy of representation is a question of fact, to be raised and resolved in the trial court in the usual manner (Warner v. First Nat. Bank, 236 F.2d 853, 858 (8th Cir. 1956); Weeks v. Bareco Oil Co., 125 F.2d 84, 93-94 (7th Cir. 1941)), and assertions in defendants' brief in this court are ineffectual to make a factual issue on plaintiffs' allegations of ability to protect the interests of the class, much less to disprove them." (Emphasis added)

Appellant Bank Board has changed its position before this Court of Appeals on the question of adequacy of plaintiff Shareholders' Protective Committee to represent the entire class of Long Beach Federal shareholders.

In the last paragraph in footnote 13 on page 11 of said appellant's Memorandum in Support of Motion for a Stay filed in this Court of Appeals about September 20, 1965, appellant Bank Board says:

"The adequacy of the representation by the Shareholders' Protective Committee of the Long Beach shareholders adversely affected by the judgment below is not being raised. The appellant Bank Board has the right to represent their interests and to enforce their claims

to the Equitable stock in dispute. Reich v. Webb,
336 F. 2d 153 (C.A. 9), cert. den. 380 U.S. 915."

Appellants reference to Reich v. Webb is particularly interesting because this Court of Appeals in that case cited with approval and quoted from Federal Home L. B. Bd. v. Greater Del. Val. Fed. S. & L. Ass'n 277 F. 2d 437 (CA-3, 1960) in that case the Bank Board alone sought to void the conversion of Greater Delaware Valley Federal from a Federal association into a Pennsylvania State association. No savings depositor of Greater Delaware Valley Federal had joined the board in the litigation in either the trial or appellate court. The Court of Appeals denied the Bank Board the relief it sought and said at page 441:

" . . . However, no shareholder has joined in this claim that the shareholders have been wronged by any unfair conduct. There is no evidence, not even an allegation, that any shareholder was in fact misled or in any way adversely affected by the failure of the proxy notice to contain the information the Board thinks it should have contained. Thus, the Board's position is not supported either by a showing of deception and injury in fact or by a showing that notice as given has failed to comply with any stated or formal requirement of law. We find no merit in it." (Emphasis added.)

Our own Ninth Circuit Court of Appeals has cited and followed the Greater Delaware Valley Federal case.

In Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert. denied 380 U. S. 915; 13 L. ed. 2d 800 3/65], this Ninth Circuit Court of Appeals considered the Greater Delaware Valley Federal decision and said at page 157:

" . . . In that case the Bank Board sought a

declaratory judgment voiding the conversion of a Federal Savings and Loan Association from a federal to a state charter until the approval of the Bank Board was obtained. No duty on the part of the Association to obtain Bank Board approval existed either at common law, by statute or by Bank Board regulations. . . . Basically the holding stands for nothing more than a declaration that substantive liability cannot be created by the Bank Board apart from statute, a proposition with which we fully agree." (Emphasis added.)

In Greater Delaware Valley Federal the Bank Board tried to nullify the conversion from a Federal to a State association. But " . . . no shareholder has joined [the Board] in this claim . . .". In our present case the appellant Bank Board has tried to forfeit \$2,500,000^{65/} of Equitable guarantee stock from several thousand Long Beach Federal savings depositors. Of the 60,000 depositors who might have claimed the forfeited stock, none (except Attorney Stevens for less than \$200) has joined the Bank Board in this claim. Not even this one attorney has joined the Bank Board in these appeals.

Appellant Bank Board received copies of each of the 5 separate notices, documents, and mailings sent by the Shareholders' Protective Committee and by Long Beach Federal by direct personal mailing to each of the 60,000 Long Beach Federal savings depositors. Said appellants, through their staff, required repeated drafting and redrafting of the 55 page "Proxy Statement for Special Meeting of Members of Long Beach Federal Savings and Loan Association" so mailed in June, 1963. It contained every statement required by said Bank Board.

Appellants Bank Board, et al., through their counsel, participated in the Court's drafting [Tr 53-99] of the mailing in November 1963 of the:

- (a) "Order of Distribution of Part of Guarantee Stock" (8 pages);
- (b) "Notice of Entry Of 'Order of Distribtuion of Part Of Guarantee Stock' And of Court Hearings In Class Actions For Partial Distribution of Equitable Savings and Loan Association Guarantee Stock to Savings Shareholders of Long Beach Federal Savings and Loan Association" (6 pages); [1R; 2R-361-366; 3R-300I-300H]
- (c) "Complaint To Quiet Title and For Declaratory Relief and Other Relief" in action No. 63-1072-P.H., (27 pages); [1R; 2R-361-366; 3R-300I-300H]
- (d) "Stipulation" for distribution of 585,821 shares of Equitable stock, dated October 29, 1963, (3 pages); [1R; 2R-395-397; 3R-300QQ-300SS]
- (e) "Merger Agreement", exhibit B, (8 printed pages); [1R; 2R-398-405; 3R-300TT-300AAA] and
- (f) "List of Class Actions" (1 printed page). [1R; 2R-406; 3R-300BBB]

These documents comprise a total of 53 pages.

Appellants made their objections to the court as to part of the contents of said notices thus given. The court considered said objections, passed upon them, made changes in the notice, etc., and approved the form of notice so given. [TR-53-99] It was mailed to all 60,000 savings depositors and published as ordered by the court. [3R-298-311]

Appellants', Bank Board and Insurance Corporation, representatives attended the April 1963 and July 1963 special mass meetings of Long Beach Federal savings depositors assembled in the

Long Beach Municipal Auditorium. Appellants' representatives were introduced to said shareholders at said meeting. They had nothing to say to the shareholders. Appellants' representatives heard the numerous questions then asked by the shareholders concerning said forfeitures and answered by the President, the attorneys, or other officers of Long Beach Federal. [Pl's. Exh. 7-A-4-8]

Appellants' representatives also heard the unanimous approval of a Resolution by the assembled Long Beach Federal savings depositors thanking the new \$100,000 and over savings depositors for their deposits and condemning as "arbitrary, unjust and illegal" the Bank Board's attempted forfeitures. [A copy of the entire Resolution is Appx. I-c hereof.] Extracts from said Resolution are:

"RESOLUTION

THANKING NEW SHAREHOLDERS

FOR THEIR INVESTMENTS

"WHEREAS, there are represented at this special meeting of the shareholders and members of Long Beach Federal Savings and Loan Association, in person or by proxy, more than 42,000 citizens holding shares in this Association convened in this special meeting on April 27, 1963 in the Long Beach Municipal Auditorium; and

"WHEREAS, our Association has three or more times been seized or threatened with seizure; and

"WHEREAS, in the seizure of May, 1946 to January, 1948, our Association share accounts were reduced by runs of withdrawals of more than \$10,000,000.00 amounting to almost one-half of our then total of approximately \$22,000,000.00 of savings share accounts; and

"WHEREAS, in the seizure of April, 1960-1962, a run of withdrawals of approximately \$69,000,000.00 reduced our association's savings share accounts from

more than \$98,000,000.00 to approximately \$28,000,000.00 or more than two-thirds; and

"WHEREAS, in 1949-1952 our Association was threatened with yet another seizure which was prevented only by an injunction of the United States Court; and

". . .

"WHEREAS, upon the restoration of our Association from said seizing agencies substantial amounts of ready cash were and yet are essential for the safety and continued existence of our restored Association; and

". . .

"WHEREAS, by the opening of such new accounts and the reopening of closed accounts, our Association in the month of April, 1962 increased its savings accounts by over \$24,000,000.00 and almost doubled the total of such savings accounts from the approximately \$28,000,000.00 low of said seizure period to a savings account balance of \$79,642,896.31 as of June 30, 1962 within three months after restoration from government seizure; and

". . .

"WHEREAS, many of the accounts coming to our Association in said growth of over \$40,000,000.00 of savings accounts in less than three months were accounts exceeding \$100,000.00 each in amount; and

"WHEREAS, many of said savings accounts constituting said \$40,000,000.00 increase in savings were used as security by said savings account holders for loans obtained by them from outside banks and other financial sources; and

". . .

"WHEREAS, the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation who have inflicted the damage and destruction on our Association of said seizures and runs and misleading front-page newspaper publicity thereof, now insist and demand that said new savings account holders in our Association whose accounts have been so used for security of bank loans or whose accounts exceed \$100,000.00 each must be required to forfeit their respective shares of the net surplus, reserves and undivided profits of our Association upon the combining of our Association with Equitable Savings and Loan Association as provided in Article XV of the Settlement Agreement of February 14, 1962 between our Association and said Bank Board and Insurance Corporation; and

"WHEREAS, we believe said attempted forfeiture is a violation of the charter of our Association, the savings account contracts made upon the creation or investment in said savings accounts, and is also contrary to, and in conflict with, the Constitution and laws of the United States and of the State of California and is a denial of due process and denial of equal protection under the laws and is an arbitrary and unlawful exercise of a nonexistent power.

"NOW THEREFORE, WE, THE SHAREHOLDERS AND MEMBERS OF THIS ASSOCIATION, DO HEREBY RESOLVE:

"1. That we the shareholders and members of this mutual savings and loan association hereby express our appreciation and gratitude to each of our savings account investors who demonstrated their confidence in our Association upon its restoration on April 2, 1962, by thereafter:

"(a) Investing in new savings accounts or increasing the amounts of existing accounts in amounts in excess of the \$10,000.00 insurance of accounts; and

"(b) Also borrowing from banks and using their said savings accounts in our Association for security for said bank loans or otherwise pledged their personal credit and resources to obtain money to invest in our mutual savings Association in its time of peril and need immediately following said restoration.

"2. We condemn as arbitrary, unjust and illegal the attempts of the seizing Bank Board and Insurance Corporation, or their successors, to compel an unconstitutional and illegal forfeiture of our said savings account investors' rights to their proportionate share of our Association's net surplus, reserves, and undivided profits."

Until this resolution was passed appellants Bank Board, et al., had sought to forfeit only savings accounts in excess of \$100,000 each. After said resolution was passed appellants expanded their forfeitures to include all savings accounts pledged or assigned for any debt regardless of the size of the savings

account and to also forfeit all accounts of over \$10,000 per account to the extent each such account exceeded \$10,000. [Pl's. Exh. 21-41 page 6]

Five times Long Beach Federal savings depositors have received written notices (totaling over a hundred pages) discussing the Bank Board's forfeitures. Twice Long Beach Federal savings depositors have assembled in special mass meetings in the Long Beach Municipal Auditorium. Twice the U. S. Trial Court has passed upon and ordered the form and contents of the notices to be sent by mail to all 60,000 Long Beach Federal savings depositors and also published in the daily newspapers.

Out of all these notices, meetings and discussions, only one of the 60,000 Long Beach Federal savings depositors would accept any of the Bank Board forfeitures. The forfeited stock he was willing to accept amounts to less than \$200 out of a total of \$9,500,000. He has now dropped out of the case and is not a party to these appeals.

Thus, the majority, by number of savings depositors, is now 60,000 against the Bank Board forfeitures and none in favor of them.

The majority rule that savings depositors in a financial institution are able to control litigation allegedly for their benefit has been followed repeatedly in the U. S. Supreme Court and in our own Ninth Circuit Court of Appeals. It was so followed in Denicke, et al., v. Anglo-California Nat'l. Bank of San Francisco, 141 F. 2d 285 (CA-9, 1944) [Cert. denied 323 U. S. 739

9 L. ed. 592.] This was a derivative action by certain National Bank stockholders against the directors and managing officer of their bank for misuse of the bank's assets and property for the personal benefit of the directors and managing officer. The total amount sought was in excess of \$5,000,000.

About \$2,590,000 had been collected from certain of the directors and officers (45 Fed. Supp. 524, at 528). Settlements of the remaining litigation were offered for a total of \$400,000.

The management of the Bank had been changed. The new management and 95% of the votes of the total outstanding stock of the Bank approved the compromise. They asked the District Court's approval of the dismissal of the class actions and acceptance of the compromise. The original plaintiffs who had filed the successful class actions opposed the dismissal and appealed. There were over 1,000 stockholders, only two of whom were appellants.

Both this U. S. Court of Appeals for the Ninth Circuit and the Supreme Court, by denying certiorari, approved the majority rule of the 95% vote of the Bank's stockholders. In affirming this Court of Appeals for the Ninth Circuit said at pages 287-288:

" . . . after notice to all stockholders, a hearing, eventuating in the judgment appealed from, was had . . .

" . . .

"[3] Under all the circumstances we think it was primarily for the shareholders and the presently constituted authorities of the Bank, acting in good faith, to determine whether the best interests of that institution did not lie in the course they asked leave to follow. Cf. *Hawes v. Oakland*, 104 U.S. 450, 462, 26 L. Ed. 827. Out of more than a thousand shareholders only two, and those the appellants,^o

objected . . .

"[4,5] Appellants insist that the court lacked power to terminate the suit without their consent. Rule 23 of the Rules of Civil Procedure affords no ground for that view, and the California authorities, at least, are to the contrary. It is the rule in that state that the stockholder is permitted to sue 'simply in order to set in motion the judicial machinery of the court.' [Citing authority] . . . We are not aware of any federal law to the contrary, and in the present circumstances we think it appropriate if not obligatory on us to apply the local rule." (Emphasis added.)

"6

Denicke owned 1,600 shares of the common stock of the Bank and Doble 1,752 shares, out of a total of 410,000 shares of common and 1,925,000 shares of preferred outstanding."

Appellants insist upon forfeitures to take from some and give to other depositors stock that none of the savings depositors of Long Beach Federal will accept. None have joined appellants either in the Trial Court or on these appeals.

The U. S. Court of Appeals for the Third Circuit in Federal Home Loan Bank Board v. Greater Delaware Valley Fed. S. & L. Ass'n., 277 F. 2d 437 (1960), refused to nullify the conversion of Greater Delaware Valley Federal from a Federal to a State association because "no shareholder has joined" the Bank Board in that case.

This Ninth Circuit Court of Appeals should reject appellants forfeitures in which "no shareholder of Long Beach Federal has joined."

Congress in 12 U.S.C. §1464(i) spelled out in great

detail what was required of a Federal association which converted to a State association. Only " . . . 51 per centum of all the votes cast at such meeting, . . . " is required.

Bank Board approval is not one of such requirements.

The Court of Appeals for the Third Circuit said in 277 F. 2d 437, at page 440:

"[3] . . . Moreover, as the court below pointed out, during the consideration of this legislation Congress was apprized of the likelihood that an association, displeased by the course of Board monition, would seek to escape federal supervision by acquiring a state charter. Expressing this fear, the then Chairman of the Board recommended that the bill be amended to enable the Board to prevent such conversion. . . . "

Congress did not follow such recommendation and no such provision became law.

Appellants were denied by Congress the power they now urge this Court of Appeals to legislate for them. Not merely "51 per centum," but the entire body of all savings depositors of Long Beach Federal voted at their special meeting thanking the \$100,000 and over new savings accounts for becoming depositors and condemning as "arbitrary, unjust and illegal" the Bank Board's forfeitures. This majority rule by the savings depositors of the disposition of their own property was followed in the Greater Delaware Valley Federal case, 277 F. 2d 437, in the Third Circuit, and by this Ninth Circuit Court of Appeals in the Denicke v. Anglo-California Nat'l. Bank of S. F., 141 F. 2d 285, case.

Only appellant Bank Board's "supervision by blackmail" [Congressional Investigating Committee Report, page 42-44 hereof

for details] thwarts the repeatedly expressed unanimous will of all Long Beach Federal savings depositors.

The Trial Court heard testimony, received exhibits, considered cross-examination and argument by appellants on the right of appellee Shareholders' Protective Committee to continue its then 18 years of representation of all Long Beach Federal savings depositors. [TR 100-237; TR 102 Def's. Exhs. A, B, A, A-1, 2,3, B, B-1,2, C; Pl's. Exhs. 1, 2, 3, 4, 5, 6, 7, 8, 9-A, 9-B, 10, 10-A,B,C,D, 11, 11-A,B,C,D,E, 12, 13 14, 14-A,B,C, 15, 15-A,B;]

In its opinion (233 F. Supp. 578 at 590-591, Appx. Ia hereof) which constitutes the findings of the trial court in this case more than a printed page is devoted to the findings on the adequacy of appellee Shareholders' Protective Committee to represent the entire class of all savings depositors in Long Beach Federal.

Although appellant Savings and Loan Commissioner devotes 6 pages to his brief to attacking such findings and appellant Bank Board also attacks the District Court findings, none of the appellants support their attack with any record references to any evidence they offered to the Trial Court upon this matter. Nor do they comment in any way upon the holding of this Ninth Circuit Court of Appeals in Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (CA-9, 1964) cited and quoted repeatedly by the Trial Court in its opinion on this subject.

Federal Rules of Civil Procedure, Rule 52 reads in part:

table surplus. It is not necessary for a class action that the persons representing the class shall have the same rights as one another; they may have unequal rights, or, indeed, they may have conflicting rights, [Harris v. Palm Springs Alpine Estates, Inc. (9 Cir. 1964) 329 F.2d 909] but still be of a class [Chance v. Superior Court of Los Angeles County et al. (1962) 58 Cal.2d 275, 23 Cal.Rptr. 761, 373 P.2d 849; Hink et al. v. Superior Court of Los Angeles County et al. (1962) 58 Cal.2d 921, 23 Cal.Rptr. 771, 373 P.2d 859]. Regardless of the amount of the deposit by any shareholder, or the date thereof, or whether or not the account was pledged, the thing all shareholders have in common is that they were depositors in Long Beach Federal Savings & Loan Association, under one common charter and one law authorizing the creating of the Association as a mutual institution, and received identical passbooks. Here, there are 60,000 shareholders; obviously so numerous as to make it impracticable to bring them all before the court. Here, there has been the greatest possible notice to all the shareholders of the position taken by the Association and the Committee, including

a copy of the Complaint in Action No. 63-1072-PH, sent to each by mail, together with an order to show cause, fixing a time and place to object, if any one cared to object. One person showed up and objected, but has proceeded no further, and the Court must conclude that he is, and all the other shareholders are, content to have the matter adjudicated with the present parties, under the pleadings framing the issues. One Ross and several others showed up and asked that they represent themselves as intervenors rather than have the Committee represent them, but each asked the same relief sought by the Committee, i. e., pro-rata distribution of the distributable assets as provided by the Statute, the charter, and the Settlement Agreement. Except for the intervenors, not a single shareholder has appeared in this or any of the three actions objecting to either the position taken by the Shareholders Protective Committee or the individuals composing it, or the position taken by the Association. The only one who is objecting is the Bank Board, and it has and claims to have no pecuniary interest whatsoever in any of the property in custody of the court, which is the subject matter of this action and which belongs to the shareholders of Long Beach. F.R.C.P. 23 "does not require that all the

ated, if there are substantial questions either of law or fact common to all." [Harris v. Palm Springs Alpine Estates, Inc. (9 Cir. 1964) 329 F.2d 909-914]. And the fact that no investor is objecting is a factor to be considered. Here, in this case, where process would be required to be served on approximately 60,000 persons, or separate suits filed, it is most appropriate to heed the admonition contained in the last cited case (p. 913) that: "Indeed, it has been suggested that 'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device,' and particularly of the 'spurious' class action provided by Rule 23(a) (3)." While that case holds that it is a question of fact to be tried, as to whether or not persons properly represent a class (with which there can be no quarrel), the undisputed facts related herein are sufficient for this court to form its judgment as a matter of law on the Motion for summary judgment. Moreover, it seems logical that "it is primarily for the shareholders" to determine what course they want to follow. [Denicke et al. v. Anglo-California Natl. Bank of San Francisco (9 Cir. 1941) 141 F.2d 285, Cert. den. 323 U.S. 739, 65 S.Ct. 44, 89 L.Ed. 592]. It cannot be overlooked that the Shareholders Protective Committee holds written proxies from more than a majority of the shareholders, and that all shareholders were advised of the position of the Shareholders Protective Committee and the Association, before the Merger Agreement was signed, and that the same Committee is and has been licensed by the State of California for 18 years, and that the Committee has participated on behalf of the shareholders in all of the long series of litigation and in the Settlement Agreement. I hold that the Shareholders Protective Committee properly represents all the shareholders as a class, under F.R.C.P. 23. In this connection, it must be kept in mind that the members of the Shareholders Protective Committee, and the intervenors are also suing *individually* as shareholders and depositors in the Association, and they have a right to have their individual rights declared, and in doing so, the court cannot escape the determination of the rights of all shareholders in order to determine the rights of one, so that any one not a party to this action could, under F.R.C.P. 71, enforce those rights "by the same process as if he were a party."

Neither appellants Bank Board nor Savings and Loan Commissioner see fit to tell this court that not one shareholder out of the 60,000 has come forward to join with either appellant on these appeals and this, despite 5 times repeated personal direct mailed notice, including a copy of the entire complaint filed by the Shareholders' Protective Committee with the U. S. Trial Court on behalf of all 60,000 Long Beach Federal savings depositors.

The position of appellants before this court is in direct defiance of the expressed command of Congress that all savings depositors shall share equally. It is also in direct defiance of the expressed wishes of all Long Beach Federal savings depositors at their mass meetings at the Long Beach Municipal Auditorium. The assembled Long Beach Federal savings depositors unanimously voted authority to their protective committee to file these actions and obtain the Trial Court's judgments.

XIV.

THERE IS NO LACHES OR ESTOPPEL BY APPELLEES

LONG BEACH FEDERAL OR ITS SHAREHOLDERS'

PROTECTIVE COMMITTEE

Appellants were fully informed at all times that appellees Long Beach Federal and its Shareholders' Protective Committee would sue to vacate appellants illegal and arbitrary forfeitures. [Pl's. Exh. 7-A-4-3 page 5; 12/9/63 - 10-A page 5] They also knew that such suits would follow and not proceed the merger. 99.4% of the votes cast were in favor of the merger. [Pl's. Exh. 12/9/63-8 page 13-16 and 3R-1136] But every ballot by which the proxies of Long Beach Federal's 60,000 savings depositors were voted contained the statement that the vote in favor of merger was cast in reliance upon the express provision of the merger agreement which reads:

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein. . . ." [Pl's. Exh. 12/9/63-4]

Such language originated with appellants but was placed in the merger agreement at the request of appellees. [3R-1135-1137]

All appellants approved the merger agreement with such language originated by them as part of such merger agreement. Thus was their express consent to these suits by appellees to contest the merger plan OR ANY PART THEREOF. [Pl's. Exh. 3-B; 3-D-4; 3-D-5]

It was therefore not necessary for appellees to swallow appellants illegal and arbitrary forfeitures OR lose the entire

merger. NOR was it necessary for appellees to enjoin or imperil their own merger by any litigation before the merger took place.

The merger took place September 10, 1963, at about 8:30 A.M. On that same day two of these actions were filed. No. 63-1072-P.H. was filed in the U. S. District Court. [1R-1; 2R-7; 3R-2 and 3R-17A, 17B]. No. 63-1230-P.H. was filed in the California Superior Court, Long Beach Branch as action No. SO C-6367 therein. [2R-7] It became No. 63-1230-P.H. when it was removed by appellants Bank Board, et al., from said California Superior to the U. S. District Court.

The third action by appellee Equitable in interpleader was No. 63-1107-P.H. [3R-2 and 3R-17A, 17B] It was filed in the U. S. District Court September 17, 1963; just one week after the merger took place. Equitable deposited the entire 789,650 shares of stock "in dispute" with the U. S. District Court when the action No. 63-1107-P.H. was filed.[3R-2 and 3R-17A, 17B]

There can be no "laches" when two of the three Court actions were filed the same day as the merger and the third action was filed within a week after the merger.

APPELLANTS RELY ON OHIO AND OTHER CASES RE STABLE
AND SAFE SAVINGS ASSOCIATIONS. SUCH CASES CAN
HAVE NO APPLICATION TO THE WRECKED AND DAMAGED
APPELLEE LONG BEACH FEDERAL AND ITS PRECARIOUS
CONDITION AFTER 20 YEARS OF SEIZURES, LITIGATION
AND RUNS

On pages 59-65 of their brief and in their appendix, appellants Bank Board, et al., quote extensively from In Re Cleveland Savings Society, 25 Ohio Op. 2d 402, 192 N.E. 2d 518 (C.P. Cuyahoga County, 1961) [page 59 of appellants said brief] and from In Re Springfield Savings Society, Case No. 60513, Court of Common Pleas of Clark County, Ohio (1965) [page 60 of appellants said brief]

But there can be no fair analogy between either the Cleveland Savings Society case or the Springfield Savings Society and appellee Long Beach Federal.

The vital distinctions between them can best be shown by a comparison contrasting in parallel columns:

APPELLEE LONG BEACH FEDERAL	BOTH THE CLEVELAND SAVINGS SOCIETY AND SPRINGFIELD SAVINGS SOCIETY
1. Desperately needed tens of millions of rapid new savings deposits to restore public confidence and prevent a third panic and run which would have	1. Had no need or use for any new deposits. Needed no protection from panic or runs.

BOTH THE CLEVELAND SAVINGS SOCIETY
AND
SPRINGFIELD SAVINGS SOCIETY

APPELLEE LONG BEACH FEDERAL

destroyed Long Beach Federal.

2. Had just been restored to its founding management from 2 years of Government seizure (1960-1962) and disasterous Government mismanagement. Had suffered in 1960-1961 a \$69,000,000 run of withdrawals by panic stricken depositors. The run was caused by Government seizures. The run took over 70% of the 1960 total deposits of \$96,000,000 and left only \$28,000,000.

3. Had no goodwill but obtained \$3,000,000 for restored goodwill caused by \$42,000,000 of new savings deposits.

4. Desperately needed \$5,000,000 of new tax shelter to avoid \$3,884,000 of possible income taxes on 1962

2. Had never been seized. Instead each had always been operated by its own management. Neither ever had a \$69,000,000 (or any) run of withdrawals. Neither had ever suffered any runs or seizures. Instead both had uninterrupted growth.

3. Had no need to restore lost goodwill. Had continuously established goodwill resulting from years of uninterrupted growth. Such goodwill could not be created by any amount of new savings deposits.

4. Had no need for any additional tax shelter of \$5,000,000 nor any damage award to shield from taxation.

BOTH THE CLEVELAND SAVINGS SOCIETY
AND
SPRINGFIELD SAVINGS SOCIETY

APPELLEE LONG BEACH FEDERAL

\$5,000,000 damage award and
other assets.

5. Had 20 years of continuous litigation with U. S. Government repeated threats of seizures, runs and destruction. Millions of dollars of attorneys' fees incurred.

6. Had been twice seized and almost destroyed. First in 1946-48 with a \$10,000,000 run of withdrawals (almost 1/2 of the 1946 deposits of \$22,000,000). Next in 1960 with a \$69,000,000 run (70% of the 1960 deposits of \$96,000,000).

7. Had been threatened with a third Government seizure in 1949-1953 which was prevented only by a U. S. Court injunction and Congressional Investigations.

8. Had been three times vindicated by Congressional

5. Had no U. S. Government litigation, never threatened with seizure, no runs or destruction.

6. Had never had a seizure or run of withdrawals. Had grown without interruption.

7. Had never needed court or Congressional protection from Government seizures and destructive runs.

8. Had never had or needed Congressional Investigations or

Investigations which con-
demned the U. S. Government
seizures.

9. Was required to retain
\$5,000,000 of its assets for
10 years to indemnify U. S.
agencies against damages they
had incurred by seizures and
mismanagement. \$42,000,000
of new savings deposits re-
leased this impounded
\$3,000,000 for immediate
distribution instead of
being held for 10 years.

10. Had been spending
hundreds of thousands of
dollars for newspaper, T. V.,
radio and other ads to
attract new savings deposits
from every possible source.
Had widely advertised its
millions in new deposits
as they came in so as to
attract more deposits.

11. The \$42,000,000 of

protection against U. S.
Government confiscation.

9. Had no impound of
\$3,000,000 to be held for 10 years
or any impound of any amount for
any time, to be released by new
savings deposits.

10. Each had kept its merger-
conversion plans as a "well kept
secret". Had not desired new
deposits.

11. Every new deposit "diluted"

BOTH THE CLEVELAND SAVINGS SOCIETY
AND
SPRINGFIELD SAVINGS SOCIETY

APPELLEE LONG BEACH FEDERAL

new savings deposits increased and decreased both the total
by 10 times the total distri- distribution and all individual
bution to all savings savings depositors shares.
depositors new and old alike,
and increased distribution to
every individual savings
depositors share by 4 times.

CONCLUSION

The above comparison demonstrates the continuing errors
of appellants. They have blindly applied the procedures for a
solvent, prosperous and growing association's (Cleveland and
Springfield) merger to the desperate and precarious plight of
appellee Long Beach Federal which without \$42,000,000 of new
savings deposits could not have survived to merge with Equitable
and thereby obtain a \$9,500,000 surplus to distribute to all
including the new savings depositors whose deposits and faith
created the surplus.

THE DISTRICT COURT HAS JURISDICTION OVER THE
CALIFORNIA SAVINGS AND LOAN COMMISSIONER TO
PREVENT HIM FROM VIOLATING THE U. S. CONSTITUTION,
FEDERAL STATUTES AND APPELLEE'S FEDERAL RIGHTS IN
THEIR FEDERAL SAVINGS AND LOAN ASSOCIATION

A. SUING THE CALIFORNIA SAVINGS AND LOAN COMMISSIONER DOES
NOT MAKE THE STATE OF CALIFORNIA A DEFENDANT

The District Court in its opinion 233 Fed. Supp. 578

at 590 held:

"[16-18] The Eleventh Amendment does not permit a State official to divest one of rights federally granted or created. The rights of the shareholders in Long Beach were created by its Federally-granted charter. And a suit against an official of a State in such an instance (as is this) is not a suit against the State. [Reagan v. Farmers' Loan & Trust Co. (1894) 154 U.S. 362, 390-393, 14 S.Ct. 1047, 38 L.Ed. 1014; Sterling etc. v. Constantin et al. (1932) 287 U.S. 378, 393-394, 397-398, 53 S.Ct. 190, 77 L.Ed. 375; Ex Parte Young (1908) 209 U.S. 123, 159-160, 28 S.Ct. 441, 52 L.Ed. 714]. The property having been deposited in this court under the interpleader statutes, the Eleventh Amendment does not prevent the Federal court from declaring the rights and obligations of the parties, and enjoining the California Savings and Loan Commissioner from interfering with such declared rights. [In re Tyler (1893) 149 U.S. 164, 13 S.Ct. 785, 37 L.Ed. 689]. The State having consented to suit against its Savings and Loan Commissioner, it is unnecessary to discuss the proposition as to whether he is an indispensable party or a necessary party. Suffice it to say he is a proper party, and rightly so in this interpleader suit, equitable in nature, so that this court may finally and effectively dispose of the entire controversy which affects some 60,000 persons."

The District Court also made other holdings on this point.

Appellant California Savings and Loan Commissioner claims the State of California cannot be sued in Federal Court because of the Eleventh Amendment to the United States Constitution.

But the State of California is nowhere sued or named as a party in any of the three actions. Nor are these suits against the Savings and Loan Commissioner suits against the State of California.

The State of California will not gain or lose one cent of money or property by the 1,899 trial court judgments nor by any judgment given or refused by this United States Court of Appeals.

If the approximately 2.5 million ^{66/} of Equitable guarantee stock held by the United States Courts is distributed equally and pro rata to all Long Beach shareholders as specified in the Association's Federal Charter, California gains or loses nothing.

Also if the pro rata shares of all Long Beach shareholders who borrowed on their savings accounts and all whose accounts are over \$10,000.00 each, are taken from them and given to other Long Beach shareholders as required by defendant Federal Home Loan Bank Board, et al., California gains or loses nothing.

In Johnson v. Lankford, 245 U. S. 541, 62 L. ed 460 (1918), plaintiff sued the banking commissioner of Oklahoma and his surety bonding company for violation of plaintiff's rights

under the U. S. Constitution and also under Oklahoma law. Plaintiff alleged that other depositors had been paid and he had been excluded from payment in violation of his Constitutional right to equal protection of the law. The suit was filed in the U. S. District Court. The banking commissioner contended the suit was prohibited by the 11th Amendment to the U. S. Constitution. The District Court agreed and dismissed. The U. S. Supreme Court reversed and said at U. S. page 545, L. ed. page 63:

" . . . The sole question for our consideration, then, is whether the cause of action stated is one against the state, of which the district court has no jurisdiction.

" . . . the action is not one against the state. To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it, and makes the redress sought against him a claim against the state, and therefore prohibited by the 11th Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both.

and further at U. S. page 546, L. ed. page 463:

" . . . immunity from suit was a 'high attribute of sovereignty--a prerogative of the state itself--which cannot be availed of by public agents when sued for their own torts.' And it was further said: 'The 11th Amendment was not intended to afford them [public agents] freedom from liability in any case where, under color of their office, they have injured one of the state's citizens.' . . ."

In Griffin v. School Bd. of Prince Edward, 377 U. S. 218, 2 L. ed. 2d 256 (1964), the U. S. Supreme Court said at U. S.

page 228, L. ed. page 263:

"(c) It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex Parte Young*, 209 US 123, 52 L ed 714, 28 S Ct 441, 13 LRA NS 932 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment."

In McNeill v. Southern R. Co., 202 U. S. 543, 50 L. ed. 1142 (1905), the corporation commissioner of North Carolina was enjoined by the U. S. District Court from violation of laws of the United States. The corporation commissioner claimed immunity from suit under the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court affirmed the injunction and said at U. S. page 558, L. ed. page 1147:

". . . But three questions are essential to be passed upon. They are: . . . Second. Whether, as to the individual defendants below, this cause in fact was a suit against the state of North Carolina. Third. Whether the order and decision of the corporation commission of North Carolina, and the statutes of that state upon which the same was based, were void because in conflict with the commerce clause of the Constitution and the act of Congress to regulate commerce."

And further at U. S. page 559, L. ed. page 1147:

"2. We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which

the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not, in any proper sense, one against the state. (Citing authorities)."

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014 (1894), the United States Supreme Court said at U. S. page 390-393, L. ed. page 1021-1022:

"... There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. . . .

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. . . . They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. . . .

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. . . ."

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property

rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. . . .

"We need not, however, rest on the general powers of a Federal court in this respect for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which suit may be brought. It is not a court of Travis county, but in Travis county. The language differing from that which ordinarily would be used to describe a court of the state was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis county.' Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. at L. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. . . .

". . .

" . . . Our conclusion from these considerations is that the objection to the jurisdiction of the circuit court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States." [Emphasis added]

In Sterling v. Constantin, 287 U. S. 378, 77 L. ed 375 (1932), the Governor of Texas had called out the State militia to enforce Texas Railroad Commission orders limiting the amount of oil that could be produced from plaintiffs' oil wells. The U. S. District Court enjoined the Governor, Texas Railroad Commission,

and other Texas officials from enforcing said administrative orders. The State of Texas and its officials claimed, even as the California Savings and Loan Commissioner claims in our case, that suit in the U. S. Court was prohibited by the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court ruled otherwise and said at U. S. pages 393-394, L. ed. pages 382-383:

" . . . The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. (Citing 9 U. S. Supreme Court Decisions) . . .

" . . . The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. . . ."

and further at U. S. pages 397-398, L. ed. page 385:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; . . .

" . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (art. 3, §2) and, so extending, the court has all the authority appropriate to its exercise. . . ."

and further at U. S. page 404, L. ed. page 388:

" . . . Complainants had a constitutional right

to resort to the Federal court to have the validity of the Commission's orders judicially determined. . . ." [Emphasis Added]

In Ex Parte Young, 209 U. S. 123, 52 L. ed. 714 (1908), the U. S. District Court enjoined the Attorney General of the State of Minnesota from enforcing unconstitutional laws of that State. The Attorney General claimed the action was one against the State of Minnesota and beyond the jurisdiction of the U. S. District Court because of the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court held otherwise and said at U. S. pages 159-160, L. ed. page 729:

" . . . The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants, is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. . . . If the question of unconstitutionality, with reference, at least, to the Federal Constitution, be first raised in a Federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts." [Emphasis added]

In Land v. Dollar, 330 U. S. 731, 91 L. ed. 1209 (1947), plaintiffs were suing the Chairman and Members of the U. S.

Maritime Commission. The action was for the return of corporate stock owned by plaintiffs, but in the possession of the U. S.

Maritime Commission. The District Court dismissed because the action was against the United States. But the U. S. Supreme Court reversed and said at U. S. page 738, L. ed. page 1216:

" . . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

B. THE STATE OF CALIFORNIA HAS CONSENTED TO SUIT AGAINST THE CALIFORNIA SAVINGS AND LOAN COMMISSIONER

Just as in Reagan v. Farmers Loan & Trust Co., (supra, page 157 hereof), Texas had consented to suit against the Texas Railroad Commission, so California has consented to suit against the California Savings and Loan Commissioner.

California Financial Code, Section 5258, reads in part:

"§5258. Acts of commissioner subject to judicial review: Time for commencement of proceedings. Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner provided for in Articles 1, 2 and 4 of Chapter 3, Chapter 5, Sections 6450 to 6455, inclusive, and Article 1, Chapter 18, of this division is subject to judicial review in accordance with law. . . ."

Each of the Commissioner's actions, orders, permits,

and approvals were made and done by the Commissioner under the authority of California Financial Code sections expressly made judicially reviewable by said Financial Code Section 5258.

The "Order Approving Merger" [Plaintiff's Exhibit "3-B"] was made under the authority of Financial Code §9203 which is part of Chapter 18, Article 1, referred to in said §5258.

By the California Financial Code sections authorizing the merger of appellee Long Beach Federal a mutual Federal savings and loan association into appellee Equitable a California State association, the State of California expressly consented to Federal law including Federal judicial review in the Federal Courts.

California Financial Code Sec. 9203 reads:

"§9203. Merger or consolidation between domestic associations and federal associations permissible. Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations, or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them."

California Financial Code Sec. 9205 reads in part:

"§9205. Commissioner's approval required: Conformity with provisions of United States laws and regulations of Federal Home Land Bank Board required. Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, . . . and with respect to any constituent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations, and transfers."
[Emphasis added]

The laws of the United States require judicial review in the United States Courts of any merger of any Federal savings and loan association if the Federal association asks such judicial review.

12 U. S. C. 1464 (d) reads in part:

" . . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail, to the Federal Home Loan Bank Board, Washington, District of Columbia."

The merger of appellee Long Beach Federal into appellee Equitable was admittedly a " . . . matter under this section [12 U.S.C. § 1464] or regulations made thereunder, . . ."

Two of the three actions filed in the U. S. District Court were expressly brought under said section 12 U. S. C. 1464 (d) (as well as other jurisdictional statutes). [1R 2-5; 3R 3-7]

The third action No. 63-1230-P.H. was originally filed in the California State Superior Court as No. SOC 6367 in the Long Beach Branch of said California Court. It was removed from said California State Court to the Federal Trial Court by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation pursuant to Federal law authorizing such removal 28 U. S. C. §1441-1442. [2R 1-184]

By such removal the Federal District Court acquired all

the jurisdiction of the California State Superior Court from which said action No. 63-1230-P.H. was so removed. Appellant California Savings and Loan Commissioner was made a party defendant in said removed action and judgment [2R 558-581; 2R 601-612] entered against him therein. [2R 914-915]

He admits, indeed he insists, he could have been sued in the California State Superior Court. But the Federal Court in a removed action acquires all jurisdiction of the State Court from which the action was removed.

In Texas & P. R. Co. v. Humble, 181 U. S. 57, 45 L. ed. 47, (U. S. Supreme Court, 1901), the U. S. Supreme Court affirmed a judgment entered in the U. S. trial court after removal of the case from a State Court. The U. S. Supreme Court said at U. S. page 60, L. ed. page 749:

"This action was brought in the state court, and removed on defendant's application. That transfer could not deprive plaintiff of the right secured to her by the local law to prosecute the suit. . . ."

In Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462 (U. S. Supreme Court, 1905), the U. S. Supreme Court said at U. S. page 250, L. ed. page 467:

". . . Whenever a right is given by the law of a state, and the courts of such state are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist. . . ."

and further at U. S. page 255, L. ed. page 469:

". . . In the exercise of that power a circuit court of the United States, sitting within the limits of a state, and having jurisdiction of the parties,

is, for every practical purpose, a court of that state. . . . It is not to be implied from the statute in question that the state intended to exclude, or supposed that it could exclude, from the Federal courts, jurisdiction of any suit to which the judicial power of the United States extended."

In Freeman v. Bee Machine Co., 319 U. S. 448, 87 L. ed. 1509 (U. S. Supreme Court, 1942), the U. S. Supreme Court reversed the lower courts for not permitting an amendment in a removed action. The U. S. Supreme Court said at U. S. page 452, L. ed. page 1513:

" . . . The jurisdiction exercised on removal is original. . . . The forms and modes of proceeding are governed by federal law (citing authorities) . . . it preserves to the federal District Courts the full arsenal of authority with which they have been endowed. Included in that authority is the power to permit a recasting of pleadings or amendments to complaints in accordance with the federal rules. (citing authorities)"

The stock permit "Permit No. LA-171" (Plaintiff's Exhib "3-C2") was made under the provisions of California Financial Code §6450 to §6455. Said sections are specifically named in said §5258 providing for judicial review.

Financial Code §11000, reads:

"§11000. Rights, powers, and privileges available to federal associations and shareholders under laws of State. Every federal savings and loan association incorporated under the provisions of the Home Owners' Loan Act of 1933, as now or hereafter amended, and the holders of shares or share accounts issued by any such association, respectively, have all the rights, powers, and privileges, and are entitled to the same exemptions and immunities granted, respectively, to savings and loan associations organized under the laws of this State and to the holders of investment certificates, membership shares, or guarantee stock of domestic associations."

The State of California and the California Savings and Loan Commissioner both knew that in dealing with Long Beach Federal Savings and Loan Association they were acting upon the Federal rights of its over 60,000 savings depositors. Such Federal rights arose under the Long Beach Federal charter, Acts of Congress, and Federal regulations. Federal questions requiring decisions by Federal Courts would of necessity arise in any merger of Long Beach Federal Savings and Loan Association into Equitable Savings and Loan Association, a California State savings and loan association. By California Financial Code §9203 and 9305 such a merger was authorized and required ". . . to be made in conformity with the provisions of the laws of the United States. . ." and by Financial Code §11000 the Federal association and the holders of its share accounts were given the same rights of judicial review against the Savings and Loan Commissioner including judicial review in the Federal Courts as were given to domestic associations and their depositors, investors and members.

The State of California submitted itself to the paramount Federal authority when it provided for the merger of appellee Long Beach Federal into appellee Equitable, a California state association. The enabling statutes, California Financial Code sections 9203 and 9205 expressly enact that all such mergers ". . . be made in conformity with the provisions of the laws of the United States, . . ."

By such enactment the State of California submitted itself to federal law and its officers, including appellant Savings and

Loan Commissioner to federal judicial review.

In Parden v. Terminal R. of Alabama Docks Dept., 377 U. S. 184, 12 L. ed. 2d 233 (1964) the State of Alabama sought to escape the liability to federal law by pleading the Eleventh Amendment to the U. S. Constitution. But the U. S. Supreme Court held that when the State of Alabama contacted federal agencies it became subject to suit in the federal courts. The U. S. Supreme Court said at U. S. page 196, L. ed. page 242:

" . . . But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. (Citing Authorities) . . . "

Appellant Savings and Loan Commissioner must believe the above decision correct as he cites it on pages 13-14 of his brief.

The Eleventh Amendment and the Fourteenth Amendment are both equally part of the U. S. Constitution. The Fourteenth Amendment reads in part:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Emphasis added]

The Eleventh Amendment does not and cannot confer upon Appellant Savings and Loan Commissioner immunity from suit when he violates the U. S. Constitution or federal rights conferred upon appellees under federal statutes in their federal savings and loan association.

Such "judicial review in accordance with law" (California Financial Code §5258) is a broad and comprehensive consent to suit in any court, State or Federal. It cannot be distorted into a limited consent for suit only in California State Courts. When the California Legislature wished to restrict suits against the Savings and Loan Commissioner to California State Courts it has said so positively and explicitly.

As examples, when the Commissioner seizes a California State association provision is made for the Association to seek Court action. Financial Code §9003 reads in part:

"§9003. When association permitted to commence action to enjoin further proceedings by commissioner: Authority of superior court. Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 30 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, . . ." [Emphasis added]

When the California Legislature wanted final decisions upon the first hearing of a matter concerning savings and loan associations it explicitly so provided. Financial Code §7404 reads:

"§7404. Same: Review by supreme Court: Modification only where abuse of discretion. An association or any of its certificate holders or shareholders aggrieved by the action of the commissioner in determining the rates of return on shares and investment certificates may at any time within 10 days after the determination of the rates apply to the Supreme Court for a review of the commissioner's determination. The commissioner's determination shall not be set aside or modified unless the court finds that the commissioner in making his determination committed an abuse of discretion." [Emphasis added]

But in the provisions affecting both Federal and State savings and loan associations the California Legislature in its wisdom has provided not for review in the Superior Court, nor in the Supreme Court, nor limited to any State Court, but instead for "judicial review in accordance with law" (California Financial Code §5258).

The U. S. Supreme Court in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014 (1894), interpreted a much more restrictive provision of the law of Texas. The U. S. Supreme Court said at U. S. page 392, L. ed. page 1021:

" . . . Section 6 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which suit may be brought. It is not a court of Travis county, but in Travis county. The language differing from that which ordinarily would be used to describe a court of the state was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis county. Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. at L. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. . . ."

The California Savings and Loan Commissioner has expressly consented that the U. S. District Court and this U. S. Court of Appeals may adjudicate the disputed ownership of the equitable guarantee stock in the possession of the Clerk of said court. The Order Approving Merger [12/12/63-12 Plaintiff's

Exhibit "3-B"] filed as part of said Commissioner's motion to
dismiss reads in part:

"6. . . . EQUITABLE shall make distribution of the guarantee stock of EQUITABLE to the shareholders of LONG BEACH FEDERAL in accordance with the terms of the 'Merger Agreement' dated June 12, 1963, and in accordance with the lawful requirements of the Savings and Loan Commissioner including the terms of the stock permit respecting said guarantee stock, but subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute." [Emphasis added]

Further the permit of said Commissioner for Equitable to issue
said stock [Plaintiff's Exhibit "3-C-2"] reads in part:

"Authorization: Upon . . . consummation of the merger in accordance with the provisions of the Order Approving Merger by the Savings and Loan Commissioner of the State of California dated August 28, 1963, Equitable Savings and Loan Association is authorized to issue 791,650 shares of its One Dollar (\$1.00) par value guarantee stock to the withdrawable shareholder members of Long Beach Federal Savings and Loan Association in accordance with the terms of Articles VII and VIII of the Merger Agreement of June 12, 1963. . . ."
[Emphasis Added]

Part of which reads:

". . . .

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach. or any part thereof, incorporated herein." [Plaintiff's Exhibit 7-A-4-3, pg. 47]

The affidavit of T. A. Gregory, President of Long Beach Federal [2R 701-702; 3R 625-626] discloses that the California Savings and Loan Commissioner and his representatives were informed that Federal Court actions were to be filed by the Shareholders' Protective Committee of Long Beach Federal by Long Beach Federal, and by Equitable Savings and Loan Association and that such actions would include U. S. District Court actions in interpleader with the Equitable stock deposited in Federal Court in such actions.

C. THE UNITED STATES COURT WHICH HOLDS PHYSICAL POSSESSION OF \$9,500,000 OF EQUITABLE GUARANTEE STOCK DECIDES ALL QUESTIONS CONCERNING THAT STOCK

The California Savings and Loan Commissioner on the 8th day of August, 1963, made his "Order Approving Merger". Equitable Savings and Loan Association thereby became obligated to issue 791,650 shares of its guarantee stock to Long Beach Federal savings shareholders. But by the express terms of paragraph 6, page 3, of said Order [Plaintiff's Exhibit "3-B"; 3R 86-688] the issuance of said stock was:

"6. . . . subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute." [Emphasis added]

Equitable was sued as a defendant in action No. SOC-6367

in the California Superior Court by Elliott, et al., as the Shareholders' Protective Committee of Long Beach Federal [2R 7 and 13]. Equitable as plaintiff thereupon filed its own action, No. 63-1107-P.H., in interpleader in this U. S. District Court. With said complaint Equitable deposited with the Clerk of this U. S. Court its stock certificate for said 791,650 shares. [3R 17A-17B]

Thereby this U. S. District Court became in action 63-1107-P.H. "a court of competent jurisdiction which may otherwise control the distribution of that number of shares of Equitable Guarantee Stock as to which ownership and entitlement are in dispute."

Later defendants Bank Board and Insurance Corporation removed from the California Superior Court action No. SOC-6367 commenced in that Court by the Shareholders' Protective Committee of Long Beach Federal. On removal said action became No. 63-1230-P.H. in this U. S. District Court. [2R 1 to 184] By orders made in all three actions (No. 63-1230-P.H., No. 63-1107-P.H. and 63-1072-P.H.) this Court has made "lawful orders" disposing of said shares of stock.

Thereby the U. S. District Court took into its physical possession and custody all of said Equitable guarantee stock.

As the court having actual and "lawful" physical possession and custody of said Equitable stock, said U. S. District Court is the only court authorized to make decisions concerning said stock and its distribution.

In Ex Parte Tyler, 149 U. S. 164, 37 L. ed. 689 (1893),

a State officer attempted to interfere with the possession of property held by Federal Receiver. The U. S. District Court promptly enjoined such interference. The State officers objected that such was a suit against the State and prohibited by the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court rejected this contention and said at U. S. page 186, L. ed. page 696:

" . . . ' . . . and when one [court] takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.' . . . "

and at U. S. page 189, L. ed. page 697:

" . . . The legislature of a state cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a state does not involve a question of power."

and further at U. S. page 190, L. ed. page 698:

" . . . where a suit is brought against defendants who claim to act as officers of a state and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the [11th] amendment, an action against the state."

This Ninth Circuit Court of Appeals has repeatedly affirmed the power of the Federal Courts to enjoin California State

officials from interfering with property in the possession of said Federal Courts. Such is held not to be a suit against the State of California.

In California State Board of Equalization v. Goggin, 191 F. 2d 726 (CA-9, 1951) [Cert. denied 342 U. S. 909, 96 L. ed. 680] this Ninth Circuit Court of Appeals affirmed an injunction to prevent California state interference with a Federal Court's disposition of assets in the custody of the Federal Court. Our Ninth Circuit Court of Appeals said at page 728:

" . . . The process of dealing with state tax assessments is one essential to the administration of a bankruptcy estate and does not amount to a suit against the state. Gardner v. New Jersey, 1947, 329 U. S. 565, 67 S.Ct. 467, 91 L.Ed. 504."

and further at page 730:

" . . . But no state is empowered to levy taxes upon the process of the courts of the United States or to impede the officers of court in an essential judicial function. . . . The Court had a right to protect its own officers in the discharge of their duties laid down by Congress. Oklahoma v. Texas, 266 U.S. 298, 45 S.Ct. 101, 69 L.Ed 296 Id., 268 U.S. 472, 45 S.Ct. 609, 69 L.Ed. 1057." [Emphasis added]

In California State Board of Equal. v. Coast Radio Prod. 228 F. 2d 520 (CA-9, 1955) this Ninth Circuit Court of Appeals again made the same holding at page 524 and said:

" . . . Nor, as appellant urges, does this proceeding constitute a suit against the state so as to come within the purview of Section 6, Art. XX of the California Constitution,¹⁴ since:

"The process of dealing with state tax assessments is one essential to the administration of a bankruptcy estate and does not amount to a suit against the state."¹⁵

- "14. . . .
"15. California State Board of Equalization
v. Goggin, 9 Cir., 1951, 191 F.2d 726, 728."

Appellee Equitable deposited the \$9,500,000 ^{67/}of
Equitable stock with the Clerk of the District Court in inter-
pleader in action No. 63-1107-P.H., appeal No. 20522. Thereby
said stock became in the custody of said Federal Court.

Under the Federal interpleader statute 28 U.S.C. §2361:

"Such district court shall hear and determine
the case, and may discharge the plaintiff from
further liability, make the injunctions permanent,
and make all appropriate orders to enforce its
judgment." [Emphasis added]

D. IT IS NOT NECESSARY TO NAME THE CALIFORNIA SAVINGS AND
LOAN COMMISSIONER AS A PERSONAL DEFENDANT.

In most of the authorities previously cited, such as
Land v. Dollar, 330 U. S. 731, 91 L. ed. 1209 (1947), Ex Parte
Young, 209 U. S. 123, 52 L. ed. 714 (1908), and others, the
actions were against the State or Government officials in their
official capacities. But whatever may have been the rule under
prior law, Federal Rules of Civil Procedure, Rule 25, was amended
in 1961, by adding a new paragraph (d) (2) which reads:

"(2) When a public officer sues or is sued
in his official capacity, he may be described as
a party by his official title rather than by name;
but the court may require his name to be added."

There have been three different California Savings and Loan Commissioners in office since 1963. A fourth new commissioner will take office in 1967.

E. THE COMMISSIONER'S AUTHORITIES APPLY ONLY TO ACTIONS TO RECOVER MONEY OR PROPERTY FROM THE STATE AND DO NOT APPLY TO OUR THREE CASES.

The Savings and Loan Commissioner's attorney cites numerous cases that a State cannot be sued in the U. S. Courts without the State's consent.

In every case so cited, the State's money or property was directly involved by the judgment sought. In 6 of the cases the State itself was sued and named as a party.

Each case sought to compel payment of State money or property from State officers to plaintiffs or to prevent collection of money by the State. All sought judgments requiring the State to pay or refund money or property.

None of these decisions can have any application to our cases.

California under no circumstances can own or claim any of the Equitable guarantee stock in the registry of this U. S. Court. California will not be one cent richer or poorer regardless of who among the thousands of Long Beach Federal savings shareholders gets, or is refused, judgment for the Equitable stock held by the Clerk of the U. S. District Court.

Our cases are decided by the line of U. S. Supreme Court decisions which hold that Government officers (State or Federal) who violate the U. S. Constitution cannot claim "sovereign immunity" as a defense.

Neither "sovereign immunity" nor the Eleventh Amendment can authorize a State official to violate both the State and Federal Constitutions by taking the property of one group of Long Beach Federal savings depositors and giving it to another group, contrary to Acts of Congress and the Federal Charter of said Association.

F. APPELLANT CALIFORNIA SAVINGS AND LOAN COMMISSIONER
MAKES CLAIMS ON APPEAL CONTRARY TO HIS ANSWERS TO
THE TRIAL COURT.

On page 24 and elsewhere in his opening brief appellant California Savings and Loan Commissioner claims only \$2.5 million (205,829 shares) of Equitable stock instead of the entire \$9.5 million (791,650 shares) are "in dispute" in these actions. He claims his consent to suit contained in his order approving merger is limited to the 205,829 shares. His order reads in part:

" . . . subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute." [Plaintiff's Exhibit "3-B" and 3R-686-688]

But appellee Equitable was sued by appellee Shareholders'

Protective Committee for the entire 791,650 shares. And Equitable as plaintiff deposited the entire 791,650 shares in the U. S. District Court in interpleader. ^{68/}

Appellee Equitable as plaintiff in case No. 63-1107-P.H. sued all defendants for declaratory relief as to the entire 791,650 shares. Equitable's complaint was served on the Commissioner. His answer reads (a) on page 8, lines 1 through 4 [3R-681 and 684]:

" . . . admits that rights of former shareholder members of Long Beach to distribution of 791,650 shares of plaintiff's guarantee stock, said to have a value of \$9,500,000 are involved in this litigation; . . . "

And further (b) on page 11, lines 5 through 8 [3R- 681 and 684]:

" . . . admits that a controversy exists between some of the parties hereto as to the distribution of the 791,650 shares of Equitable stock said to have a value of approximately \$9,500,000, . . . "

After these admissions no doubt can exist that 791,650 not 205,829 are the shares "in dispute". This mis-statement in said appellant's brief that "only 205,829 shares are in dispute" demonstrates the errors of his elaborate attempts to confuse the judgments of the Trial Court disposing of stock. All stock was in dispute. All stock was in court subject to the Court's orders. All stock yet held by Equitable as an elisor of the court yet remains subject to court orders.

^{68/} Such deposit was made by a single stock certificate in favor of "All Savings Shareholder Members Of Long Beach Federal Savings and Loan Association As Their Respective Shares And Rights May Be Finally Decided By Final Judgment". [3R-17-A, 17-B]

The October-December, 1963 distribution of 585,821 shares pursuant to stipulation and consent order resulted from prior orders to show cause issued by both State and Federal Courts and served upon appellants Bank Board, et al. [3R 180-190, 1R 204-213, 2R 260-270]

Appellants sought desperately to avoid or delay hearings on said orders to show cause. [Transcript - October 21, 1963, Pgs. 1-32] When unable to do so appellants conceded and stipulated to the 1963 distribution of \$7,000,000 (585,821 shares).

Then only did the "dispute" as to the 585,821 shares end and such shares became not in dispute.

However, appellants' demands that this Court require Equitable to divest itself of Long Beach Federal's assets and to reconstitute.^{69/} Long Beach Federal places the entire 791,650 shares again "in dispute". It might be necessary to call back some or all of the 585,821 shares already distributed if Long Beach were to be reconstituted. How this could be done after distribution of most of said 585,821 shares among 60,000 Long Beach Federal savings depositors is not discussed by appellants.

Yet the California Savings and Loan Commissioner on page 12 of his brief "adopts the appellate brief filed in these cases by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation."

Appellant Commissioner's brief is also misleading on page 30 where he states "As of April 30, 1962, Long Beach Federal

^{69/} Opening Brief of appellants Bank Board, et al., at pages 43 and 39, etc.

had in excess of \$38 million in cash on hand and in banks. . . . "

[Plaintiff's Exhibit "6", tab 4/30/62]

The same exhibit shows that Long Beach Federal received over \$38,000,000 in new deposits in April.

Without such new deposits there would have been NO CASH in the Association by the end of April. Had such condition existed the resulting run would have closed Long Beach Federal forever.

Appellant Bank Board's brief is equally misleading on page 52, Footnote No. 38, where it speaks of Long Beach Federal's "liquidity ratio". Such ratio was after Long Beach Federal received \$38,000,000 of new savings deposits in April, 1962. An increase from about \$30,000,000 to \$68,000,000 in one month is bound to result in "extraordinary high ratio of liquidity". The new savings deposits alone saved Long Beach Federal from financial ruin.

CONCLUSION TO THIS POINT

The California Savings and Loan Commissioner was made a party defendant in these actions to obviate the objection made by the Federal defendants that said Commissioner was an absent but "indispensable party."

The State of California has consented that said Commissioner may be sued for "Judicial review in accordance with law". The Commissioner himself by his Order Approving Merger

and by his Stock Permit has submitted to "the lawful orders of any Court of competent jurisdiction which may otherwise control the distribution of . . . said guarantee stock of Equitable".

The then (1963) Commissioner and his then representatives knew when they made said Order Approving Merger that Federal Interpleader as well as State court actions were expected. The U. S. District Court having physical possession of the stock certificates issued by Equitable certainly has jurisdiction of the Savings and Loan Commissioner of California under these circumstances.

XVII.

SUMMARY JUDGMENT WAS A PROPER METHOD
FOR THE TRIAL COURT TO DECIDE THE CASE.

No appellant raises any question in any of their specifications of error or otherwise, that the Trial Court should not have decided the case upon summary judgment procedure.

Appellants Federal Home Loan Bank Board, et al., at page 23 of its opening brief as specification of error "j" assert that the District Court erred in not granting summary judgment in favor of the Board.

Specification "i" on the same page asserts that the Court erred in granting summary judgment against the Board. But no claim is made anywhere in any of any appellant briefs that there were any disputed issues of fact.

Appellant Savings and Loan Commissioner "adopts" the briefs of appellant Bank Board, (at page 12 of his opening brief).

The basic facts upon which the District Court rendered its summary judgment were not only undenied but were matters of judicial notice which were, and are, undeniable. Both the Trial Court and this Court of Appeals take judicial notice and knowledge of the more than 20 years of prior litigation between these same parties. Such judicial notice and knowledge includes both the Court and Congressional findings, evidence, testimony, exhibits, hearings, Congressional Committee Investigations, reports and

70/
proceedings.

Summary judgments based upon such judicial notice and knowledge have been repeatedly used to determine complicated banking and financial litigation where there are no disputable facts and issues of law alone are presented.

Among such cases are:

First National Bank in Billings v. First Bank Stock Corp., 306 F. 2d (CA-9, 1962) was an action by four banks against a Bank Holding Company and several other banks to prevent a sixth bank from violating the Bank Holding Act by opening a branch. The Trial Court decided the entire case on motion for summary judgment. This Court said at page 939:

"The judgment dismisses the action on the merits, upon appellees' motion for summary judgment on both counts. The decision was based on affidavits, a pre-trial order embodying some 77 paragraphs of agreed facts, depositions of certain officers of Midland, taken by appellants, and testimony of the president of one of the plaintiff banks. The court summarized the facts in its opinion, determined that there is no genuine issue of material fact, and entered judgment accordingly. We are affirming."

And further at page 942:

". . . In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it.

" . . .

"Is there anything in the record showing that there is a 'genuine issue as to any material fact' relating to this contention

70/
See footnote 12 page 11 hereof for citations regarding judicial knowledge and notice.

(Rule 56 (c), F. R. Civ. P.)? We find nothing so showing. . . ."

And further at page 943:

"Under these circumstances, unless appellants made an evidentiary showing which, if accepted, could be held by a trier of fact to permit a contrary conclusion, there was no genuine issue of fact to be tried. Under Rule 56, F.R.Civ.P., if defendants make a showing that would entitle them to judgment unless contradicted, the plaintiffs then have a duty to show that such contradiction is possible; they cannot rest upon the allegations of their complaint. The whole purpose of Rule 56 would be frustrated if they could.

"Here, no such showing was made by appellants. . . .

" . . . If they had other evidence, the time had arrived to produce, not necessarily all of it, but a least enough to show a genuine issue of fact to be tried."

In U. S. v. Mt. Vernon Milling Co., 345 F. 2d 404 (CA-7, 1965), the United States failed to make sufficient opposition to a motion for summary judgment against it. The Trial Court entered summary judgment and the United States Court of Appeals for the Ninth Circuit affirmed and said at page 404:

"Plaintiff-appellant, the United States of America, brought this action on behalf of the Commodity Credit Corporation, hereinafter sometimes called 'CCC', to recover damages . . ."

And further at page 405 and 406:

"Relying on the pleadings, including its own answer denying that plaintiff was damaged as a result of defendant's conduct; answers to interrogatories; and affidavit of Dr. Ferrari, [Defendants moved for Summary Judgment]

" . . .

" . . . At this point in the proceedings, something more was required of the plaintiff beyond bare allegations and conclusions of its complaint to show the existence of an issue as to a material fact to prevent grant of a motion for summary judgment. First National Bank in Billings v. First Bank Stock Corp., 9 Cir., 1962, 306 F.2d 937, 943.

"[3] Contentions dispositive of the case were not in dispute. The District Court correctly concluded that there was no genuine issue as to any material fact necessitating a trial. Charles A. Lawes Co. v. Detex Watchclock Corp., 7 Cir., 1962, 300 F. 2d 393, 395. To oppose the motion successfully, plaintiff was obliged to come forward with evidence to show the existence of a conflict. Repsold v. New York Life Ins. Co., 7 Cir., 1954, 216 F. 2d 479, 483; Robson v. American Casualty Co. of Reading Pa., 7 Cir., 1962, 304 F. 2d 656."

And further at page 407:

"[4] Intangible speculation does not raise an issue of material fact. Chesapeake & Ohio Ry. Co. v. International Harvester Co., 7 Cir., 1959, 272 F. 2d 139, 142."

Appellant's affidavits re summary judgment failed completely to show any personal knowledge of any affiant which would be admissible in evidence.

Federal Rules of Civil Procedure 56 (e) reads in part:

"Rule 56.

"SUMMARY JUDGMENT

" . . .

" (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . ."

None of the affidavits state or show that any of the affiants is competent to testify on the matters stated therein. Appellant Savings and Loan Commissioner's affidavit was sworn to by the Commissioner who was not even in office at the time of the matters related in his affidavit. Nor can appellants rely upon the affidavit of their attorney Wilfand.

Similar affidavits have been held valueless on a Motion for Summary Judgment.

In Hoston v. J. R. Watkins Company, 300 F. 2d 869 (CA-9, 1962) the U. S. Court of Appeals for the Ninth Circuit said at page 870:

" . . . Watkins' affidavit in support of the motion does not comply with Rule 56 (e), F. R. Civ. P. It was made by Watkins' counsel, who obviously did not have personal knowledge of most of the things that he referred to, and whose testimony would not have been admissible in evidence at the trial. . . ."

In Chambers v. United States, 357 F. 2d 244 (CA-8, 1966), the 8th Circuit Court of Appeals approved the above decision of this 9th Circuit Court of Appeals and said at page 228:

"[5] The statement of the Assistant United State Attorney, based as it is upon information furnished by others, obviously does not comply with Rule 56 (e) and does not constitute admissible evidence. It is, therefore, not entitled to and will be given no consideration here. Hoston v. J. R. Watkins Co., 300 F. 2d 869, 870 (9th Cir. 1962)."

In Paramount Pest Control Service v. United States, 304 F. 2d 115 (CA-9, 1962) the Court of Appeals for the Ninth Circuit said at pages 116 and 117:

" . . . Rule 56 (e), Federal Rules of Civil Procedure, 28 U.S.C.A., permits the use of affidavits in support of or in opposition to a motion for summary judgment, but also requires that the facts stated in them be admissible in evidence upon a trial. Obviously then, it was incumbent upon the court to determine whether the proffered proof would be admissible in evidence, and if it clearly infringed upon the parol evidence rule then there was no alternative save to reject it. Ford v. Luria Steel & Trading Corp., 192 F. 2d 880 (8th Cir. 1951); . . ."
(Emphasis added)

Federal Rules of Civil Procedure, Rule 56 (e) further

reads in part:

" . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963."

Appellants failed to show any facts or testimony which could create any genuine issue of fact for trial.

The real issues of these appeals are, can appellants violate the act of Congress, the Settlement Agreement, and appellee Long Beach Federal's Charter which all require equal and pro rata distribution among all Long Beach Federal savings depositors.

Appellants insist upon an unequal and preferential distribution forfeiting some depositors and giving such forfeited deposits to other favored depositors in violation of the foregoing.

CONCLUSION

The U. S. Trial Court has ruled appellants' secret and ex post facto forfeitures and penalties "are illegal and void, and that the action of the Bank Board in 'insisting' on them as a condition of the merger was arbitrary and contrary to, and without authority in, law." [233 F. Supp. 578, at 598 (Appx. I-a hereof.)] This ruling is by the same Trial Judge who has heard these (and prior) cases between appellants and appellees for over 20 years. The U. S. Trial Court, in hearing and denying appellants' request for enforcement of their forfeitures, took testimony and received evidence. He also considered thousands of pages of exhibits, Congressional investigations, sworn testimony of appellants' chairman, Board members and counsel. He also considered the hundreds of pages of court reporters' transcripts of the mass meetings of appellee Long Beach Federal savings depositors held in the Long Beach Municipal Auditorium. He had before him hundreds of pages of correspondence signed by appellants and appellees [Plaintiff's et al. Exhibits 21-A1 thru 72E]. From all this mass of evidence as well as affidavits for summary judgment, he made his findings and decision.

That no savings depositor will accept appellants' forfeitures nor objects to the Court's decision demonstrates its justice and fairness.

The gross inequity of appellants' secret forfeitures and penalties is demonstrated by the refusal of all Long Beach

Federal savings depositors who might benefit thereby to accept ^{71/}any of the forfeited stock. None have joined with appellants in these appeals.

The Bank Board has shown this Court of Appeals no reason or justification for excluding any shareholder from equal and pro rata distribution.

In Joint Anti-Fascist Refugee Com. v. McGrath, 341 U. S. 123, 95 L. ed. 817 (1951) Mr. Justice Frankfurter said in his concurring opinion at page 171 U. S., 854 L. ed.:

" . . . 'The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.' [Citing authorities] Appearances in the dark are apt to look different in the light of day.

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights . . . "

In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220 (1886), the U. S. Supreme Court said at U. S. page 370, L. ed. page 226:

" . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

and further at U. S. page 373, L.ed. page 227:

". . . and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

In Ochoa v. Hernandez Y Morales, 230 U. S. 139, 57 L.ed. 1427 (1913), the U. S. Supreme Court said at U. S. page 161, L.ed. page 1437:

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled useages and modes of procedure, and without notice or an opportunity for a hearing." [Emphasis added]

Appellants have shown no basis whatsoever for reversal of any 1899 judgments made and entered by the District Court. All said 1899 separate judgments should be affirmed.

Respectfully submitted,

CHARLES K. CHAPMAN

CHARLES K. CHAPMAN, Attorney for Appellee Long Beach Federal Savings and Loan Association.

GEORGE W. TRAMMELL

GEORGE W. TRAMMELL, Attorney for Shareholders' Protective Committee.

REFERENCE TO APPENDIX I - II - III

Appellees' Appendix I, Appendix II, and Appendix III are each separately bound under separate covers.

Appendix III is the 1960 Report of the Congressional Committee's Investigation of Appellants' seizure of Long Beach Federal Savings and Loan Association.

Appendix I contains, among other things, a printed and bound copy of the opinion of the District Court, 233 F. Supp. 578 attacked by these appeals. A complete index of Appendix is page (i) thereof.

Appendix II contains, among other things, the more than 100-page class action Judgment containing 1899 separate judgments entered by the Trial Court in favor of the several thousand forfeited savings depositors.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; except that it exceeds 80 pages in length. Application for leave to file it notwithstanding is made separately.

CHARLES K. CHAPMAN

CHARLES K. CHAPMAN, Attorney for
Appellee Long Beach Federal Savings
and Loan Association

